Supreme Court, U.S.
FILED
DEC 19 1995
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No. 95101 5

In The

Supreme Court of the United States

October Term, 1995

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN AND PATRICK VECCHIO, SUPERVISOR, TOWN OF SMITHTOWN,

Cross-Petitioners,

vs.

SSC CORP.,

Cross-Respondent.

Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court below err in failing to distinguish the Smithtown solid waste ordinance, which entirely eliminated the private market for waste disposal services in its jurisdiction, from the local ordinance struck down by this Court in *C&A Carbone v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), which favored a single entity in the private market, and was therefore violative of the dormant Commerce Clause of the Constitution?

2. Did the court below err in failing to invoke the Market Participant Doctrine to the purchase by Smithtown of private waste disposal services exclusively for its own use, after Smithtown had assumed the obligation of providing waste disposal service to its citizens by prohibiting the sale of private disposal services within its jurisdiction?

LIST OF PARTIES

The parties are those set forth in the caption.

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Cross-Petitioner Town of Smithtown (the "Town") prays that a writ of certiorari issue to review that part of the judgment and order of the Second Circuit Court of Appeals which found the Solid Waste Code of the Town of Smithtown to be in violation of the Commerce Clause of the United States Constitution.

OPINIONS BELOW

The decision of the Second Circuit Court of Appeals is reported at 66 F.3d 502 (2d Cir. 1995) and is reproduced in the Petition of SSC Corp. at Appendix A thereto, at 1a-35a. The decision of the District Court is unreported and is reproduced in the appendix to the Petition of SSC Corp. at Appendix C thereto, at 39a-41a. The decision of the Second Circuit Court of Appeals in the companion cases to this matter, *A. A. & M. Carting Service, Inc. v. Town of Babylon* and *USA Recycling, Inc. v. Town of Babylon,* is reported at 66 F.3d 502 (2d Cir. 1995) and is reproduced in Appendix A hereto at 1a-52a.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals invalidating provisions of the Smithtown Code on Commerce Clause grounds was rendered on September 19, 1995.

This Court's jurisdiction to hear this case upon certiorari is conferred by 28 U.S.C. § 1254, since the Court of Appeals invalidated, in a final judgment, a local law as violative of the dormant aspect of the Commerce Clause of the United States Constitution, Art. I, Sect. 8, cl. 3. Federal jurisdiction in the District Court was originally invoked under 42 U.S.C. § 1983.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Smithtown Code § 177-2:

Intent and Purpose

It is hereby found that in the exercise of sound management and in the supervision and control over the storage, collection, transportation, processing and disposal of solid wastes, the Town is exercising a central and proper governmental function in accordance with the express policy of the State of New York and that the powers and duties enumerated herein constitute proper Town purposes to benefit the health, safety and general welfare of the Town and its residents. Therefore, pursuant to the Town Law, the General Municipal Law and the Municipal Home Rule Law of the State of New York for the purpose of providing on a Town-wide basis for the management, supervision and control of the collection, transportation, processing and disposal of all solid waste generated or existing within the Town, including, without limitation, the power to require the segregation of wastes and to require the delivery of solid waste to such waste management facility as may be designated by the Town Board from time to time, and the Town Board of the Town of Smithtown does hereby adopt this chapter to promote the health, safety and general welfare of the Town of Smithtown.

Smithtown Code § 177-17:

> A. All acceptable waste generated within the Town shall be collected, transported and delivered to such solid waste management facility or facilities within or outside the Town as the Town Board may designate by resolution at least 10 days prior to the effective date thereof.
>
> B. No person authorized to collect or transport acceptable waste within the Town shall dispose of acceptable waste generated within the Town except at a solid waste management facility designated by the Town Board pursuant to this section.

United Stated Constitution, Article I, Section 8, Clause 3:

> Congress shall have Power. . .
>
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

STATEMENT OF THE CASE

A. Preliminary Statement

The question presented in this case is simply whether there is a difference, under the Commerce Clause, between solid waste regulations which vest in local government the exclusive power to provide community disposal services, and those which attempt to grant that power to a private business.

The vesting of this exclusive power in the government, and the subsequent fulfillment of the government's resulting obligation to the public, is the difference between the solid waste "flow control" ordinance of the Town of Smithtown (the "Town") and the local ordinance which this Court struck down in *C&A Carbone v. Town of Clarkstown*, 114 S. Ct. 1677 (1994) (hereinafter, "*Carbone*").

On September 19, 1995, a panel of justices of the Second Circuit Court of Appeals decided three cases, in two opinions, examining the extent and nature of municipal powers to regulate, and as a separate matter, to directly provide solid waste services, in light of the dormant aspect of the Commerce Clause. Challenges to municipal actions were brought by waste hauling firms in *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995) (hereinafter, "*Smithtown*"), *A. A. & M. Carting Service, Inc. v. Town of Babylon and USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 502 (2d Cir. 1995) (hereinafter, collectively "*Babylon*"). The plaintiff haulers claimed in each case that the municipalities had unconstitutionally restricted their rights to collect and dispose of waste under this Court's ruling in *Carbone*.

Read in conjunction with each other, the two opinions present an analysis which delineates the scope of municipal power under the Commerce Clause to regulate private enterprise on the one hand, and to directly participate in the solid waste services market on the other. Moreover, the Court examined acts of municipal regulation and procurement of services which are commonly used by municipalities in the State of New York, and elsewhere, to manage solid waste. As such, the decision can be expected to have wide applicability to other municipalities.

However, the court below found the so-called "flow

control" provisions of the Smithtown Code to be governed by *Carbone*, and invalidated the legislation through which the Town assumed the duty of providing community-wide waste disposal service. The Town now requests this Court to hear argument that the Code is distinguishable from the Clarkstown ordinance and that the view taken by the Second Circuit Court of Appeals constitutes an unintended expansion of the holding in *Carbone*. This is because the analysis of the Code in the decision below is simultaneously inconsistent with the Court of Appeals' own reasoning with regard to the other aspect of this case, the Town's Solid Waste Collection and Disposal Improvement Contract (the "Contract"), and with its holding in the companion cases to this matter.

Solely with respect to the Smithtown Code, the rulings below create an unnecessary and illogical limitation on the power of local government to provide services to its citizens. The *Babylon* and *Smithtown* decisions may be read to hold that a municipality may properly, *i.e.*, without discrimination, eliminate the private market for waste disposal service indirectly, through the use of its taxing power, but it may not do so directly, through the use of its police power. Put another way, the decisions seem to support the notion that a municipality may provide uniform exclusive disposal service only if it first provides exclusive collection service. This Court may correct this result by distinguishing the action of Smithtown here from the action of Clarkstown in *Carbone*.

Smithtown's waste management program encompassed two separate acts. The assumption of the responsibility for waste disposal by *prohibiting* the private sale of disposal services constituted regulation of the disposal market. However, the *purchase* of disposal services from its neighbor's waste-to-energy facility constituted market participation.

The court below erred in failing to address these separate acts individually. The prohibition of the sale of disposal services in Smithtown by *all* private entities was regulation, but precisely because all private activity was banned, that regulation did not favor a local interest or discriminate against interstate commerce. On the other hand, the Town's purchase of disposal service from a private vendor, through the expenditure of public funds, was an act of procurement of goods and services no different in kind than the purchase of a fleet of street sweepers, an office computer system or a box of paper clips.

The regulatory action of the Town was directed at one class of economic activity — what may be termed the private "retail" market for sales of disposal service directly to generators. This market was eliminated by the Code. The Town's proprietary act of hiring an incinerator (or any other) contractor took place in another class of economic activity — among the market of disposal service providers who are capable of selling large scale or "wholesale" services to the government. In this marketplace, the Town is a participant buyer, and has the power to fix its own specifications for the services it desires.

When a municipal contractor, working exclusively for the public, is not recognized as the government's instrument in the performance of a public function, but as the beneficiary of local economic protectionism, the distinction between the public and private sectors is blurred. In such a situation, the Commerce Clause can become a weapon wielded by private interests to excise coveted service areas from the public sector. There is, and must be, a distinction under the Commerce Clause between regulations establishing municipal services and regulations discriminating against interstate commerce.

B. Statement of Facts

Smithtown is a political subdivision of the State of New York, located in western Suffolk County on Long Island, with a population of approximately 125,000 persons. It is a suburban community comprised of roughly 32,000 residential households together with a variety of businesses, institutions and other commercial enterprises. These commercial enterprises occupy approximately 18% of the land area of the Town, but generate over 40% of the community's solid waste.

Collection and disposal of waste generated by residences is performed by the Town through an Improvement district, utilizing the services of collection firms under contract with the Town. Residential properties are assessed an annual fee for the provision of the service, which appears on each household's property tax bill. The terms of Smithtown's Improvement Contract were challenged by Petitioner SSC Corp. ("SSC") on Commerce Clause grounds in the proceedings below, and those terms were upheld by the Court of Appeals.

Collection of solid waste from businesses and all other "commercial" sources in Smithtown has historically been performed by private carting firms or haulers under hire to waste generators. Petitioner SSC is a carting firm licensed to collect solid waste in the Town, and in addition to holding a Contract with the Town for residential service in the Improvement, also services a number of commercial customers.

In the mid-1980s, following adoption of various Federal and New York State policies designed to upgrade or replace

local solid waste disposal facilities,[1] the Town was forced to close its existing, unlined landfill and decide whether or not to continue providing municipal waste disposal service to its citizens. Smithtown elected to reaffirm its duty and obligation in this field. The Town began discussions with its neighbor to the west, the Town of Huntington, regarding the joint provision of waste disposal service for the citizens of the two Towns.

Huntington had solicited proposals for waste-to-energy disposal services from a variety of technology vendors, ultimately selecting Ogden Martin Systems, Inc. ("Ogden")[2] for the construction of a 750 ton-per-day facility (the "HRRF"), at a cost of $176 million, to be built on a site owned by Huntington, immediately adjacent to both the Huntington and Smithtown landfills. Smithtown, meanwhile, had secured approval to construct a limited expansion of its landfill, built to current legal standards, which could provide disposal capacity for both Towns for a fixed period of time.

In December 1989, Smithtown and Huntington executed a Municipal Cooperation Agreement (the "MCA") under Article 5G of the General Municipal Law of the State of New York. Under the MCA, the two Towns committed themselves to joint responsibility for the obligations incurred by Huntington in its bond agreements with the New York State Environmental

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1. *See* N.Y. Environmental Conservation Law §§ 27-0106, 27-0107 and 27-0704 for articulation of state policy as to waste management hierarchy, planning structure and specific limitations on waste disposal options in Nassau and Suffolk counties.

2. Ogden is a Delaware corporation which formed a Delaware limited partnership, C-E Huntington L.P., as a special subsidiary to operate the HRRF.

Facilities Corporation[3] and in its Service Agreement with Ogden. At the same time, each Town granted the other equal rights to use their respective facilities.

Under the bond agreements, security for the Huntington Facility was provided by the promise of the Towns to pay all principal and interest on the bonds, together with all costs for operation and maintenance of the Facility.

Under the Facility agreements, the Towns are absolutely and unconditionally liable for the payment of the capital and operations costs, but hold exclusive rights to use the capacity of the Facility. Ogden is not empowered to offer disposal services or sell Facility capacity to any entity other than the two Towns.

Smithtown utilizes both general tax revenues and a "tipping fee"[4] to allocate disposal costs to the public. The tipping fee charged by Smithtown for both residential and commercial waste is $65 per ton.[5] Revenues from tipping fees

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3. The Environmental Facilities Corporation is a public authority organized under New York law for the purpose, among others, of financing the construction of solid waste facilities in the state. The EFC issued the bonds for the construction of the HRRF.

4. Prior to the adoption of the current provisions of the Code in 1991, the Town had provided disposal service to the community at its municipal landfill. No tipping fees were charged at the gate, which had the effect of attracting not only Smithtown waste, but waste from other towns, despite preexisting legislation reserving the use of the landfill to Smithtown generators only.

5. The fee charged by Huntington is also $65 per ton, although the MCA does not require parity in fees, or otherwise specify the revenue sources for payment of the financial obligations. The Town's tipping fee for recyclables is $0, notwithstanding the Town's costs of processing the materials, in order to encourage the separation and delivery of recyclables. (*See Smithtown* SSC Petition at 10a).

constitute some 30% of the Town's expenditures for its solid waste programs. Real property taxes, based on *ad valorem* assessments, account for 70%. Solid waste expenditures in turn constitute 58% of Smithtown's annual budget.

The parties have stipulated that Chapter 177-17(B) of the Smithtown Code operates to require SSC, and all licensed collection firms doing business in Smithtown, to deliver waste collected in the Town to Town facilities, including the HRRF. There is no claim in this litigation that the Code applies to waste collection activities, or waste generated, in any other jurisdiction. (Joint Statement of Stipulated Facts ¶¶ 12-14, Appendix B hereto at 55a-57a).

The parties have also stipulated to the fact that tipping fees for residential and commercial waste are charged by and paid to the Town of Smithtown, not to its contractor, Ogden Martin. (Joint Statement of Stipulated Facts ¶ 8, Appendix B hereto at 55a).

In April 1994, as a result of steps taken by the Town to enforce the Contract with SSC in the Improvement, SSC brought the action below to challenge both the Contract and the provisions of the Smithtown Code which required it to use the disposal services provided by the Town. SSC was successful on both aspects of its challenge in District Court, but on appeal, the U.S. Court of Appeals for the Second Circuit reversed as to the Contract and affirmed as to the Code.

REASONS FOR GRANTING THE WRIT

I.

REGULATION WHICH ENTIRELY PROHIBITS A PRIVATE SERVICE MARKET DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

A. Standard of Review.

Article I, § 8, cl. 3 of the U.S. Constitution ascribes the power to regulate commerce to the Congress, and by negative implication, denies this power to the states. When a local law is called into question under the dormant Commerce Clause, the first question is whether the local law discriminates against interstate commerce. If so, the law is "virtually per se" invalid. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531 (1978). If the law does not discriminate against interstate commerce, it will not violate the Constitution so long as it does not impose a burden on interstate commerce which is clearly excessive in relation to the putative local benefits of the law. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970).[6]

In *Oregon Waste Systems v. Department of Environmental Quality*, 114 S. Ct. 1345 at 1350 (1994), the Court defined discrimination as follows:

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6. Where a local law is considered to facially discriminate against interstate commerce, it will not offend the Commerce Clause if it can be shown "that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Oregon Waste Systems v. Department of Environmental Quality*, 114 S. Ct. 1345 at 1351 (1994); *quoting New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 1810; *Maine v. Taylor*, 447 U.S. at 151, 106 S. Ct. at 2454 (1986).

> As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.

However, not all municipal actions are subject to the strictures of the dormant Commerce Clause. When a municipality acts, not as a regulator of private economic interests, but in a proprietary manner, buying or selling goods and employing services on its own behalf, it is a market participant, and its actions are excepted from review under the Commerce Clause. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S. Ct. 2488 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S. Ct. 2271 (1980); *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204, 103 S. Ct. 1042 (1983).

B. The Analysis Employed in the Decisions Below.

In rendering its decisions in the *Smithtown* and *Babylon* cases, the Court of Appeals rejected the suggestion that the *Carbone* case should be read to support an interpretation of the Commerce Clause which would preclude municipalities from providing basic sanitation services to their citizens on an exclusive basis. (*Babylon* at 48a-49a). The Court recognized the traditional power of local government to provide waste collection and disposal service with public employees, and invoked the Market Participant Doctrine to uphold the government's right to hire the outside contractor of its choice to accomplish the same end. Its analysis reconciled the recent rulings in *Carbone* and other Commerce Clause decisions with the precedents the Supreme Court laid down in *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905) with respect to exclusive municipal services.

The *Smithtown* and *Babylon* opinions together contain several important findings of fact and rulings of law which the Cross-Petitioner Town of Smithtown believes are properly decided. The Town takes issue with the Court's cursory, and inconsistent ruling that the regulatory aspects of the Smithtown Code discriminated against interstate commerce. The key rulings in the two decisions which the Town believes were altogether correct are set forth briefly as follows.

1. The Court recognized that the provision of waste collection services on the one hand and waste disposal services on the other, are two "'discrete, identifiable class[es] of economic activity'" in which municipalities may be engaged. (*Smithtown*, SSC Petition at 27a, citing *White*, 460 U.S. at 211, n.7, 103 S. Ct. at 1046 n.7).

2. The Court's analysis was premised on the view that the purchase and sale of waste services, rather than the waste itself, are the articles of commerce to be examined for Commerce Clause purposes. (*See Carbone*, 114 S. Ct. at 1682).

3. The Court found that the creation of a special tax district for collection of commercial waste in the Town of Babylon constituted regulation of the private marketplace. It then found that the regulation did not discriminate against interstate commerce because it applied equally to all private sector interests by eliminating the private market for commercial waste collection. (*Babylon* at 22a).

4. The Court found that Babylon's purchase of collection services for its commercial district from a single private firm was not regulation of the market, but participation in the market by Babylon, and that the Commerce Clause was therefore not implicated. (*Babylon* at 34a-36a).

5. The Court found that Smithtown's purchase of collection services for its residential district from SSC was not regulation of the market, but participation in the market by Smithtown, and that Smithtown had the power to direct the manner of disposal of the waste collected under its Contract with SSC. (*Smithtown,* SSC Petition at 26a-28a).

6. The Court found that Babylon's purchase of disposal services from a private incinerator operator (Ogden) also constituted market participation, entitling Babylon to offer the capacity it had purchased at that incinerator to its collection contractor at no charge. (*Babylon* at 41a-42a).

7. The Court properly recognized that, when exposed to liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 U.S.C. § 9607(a) (1988), as an "arranger" of waste disposal, a municipality holds an interest in the proper disposal of its waste. (*Smithtown,* SSC Petition at 30a-31a).

8. Finally, the Court properly decided that Smithtown's use of its police powers to prohibit SSC from selling disposal services to local waste generators, and requiring it to purchase those services from the Town, was market regulation, not market participation. (*Smithtown,* SSC Petition at 20a-23a).

The error of the Court below was made not in its finding that the Smithtown Code constituted regulation of the waste disposal market — it did. Rather the error lies in the Court's failure to recognize the interest favored by the regulation as the Town itself, and thereby distinguish the Smithtown Code from the Clarkstown ordinance.

C. The Target Market of Smithtown's Regulation Was Private Retail Disposal.

The purpose and effect of the Smithtown Code was to preclude licensed waste haulers in the Town from offering their own disposal services to their customers (Code § 177-17 B), and to preclude generators in the Town from consigning their waste to disposal facilities other than those provided by the Town (Code § 177-17 A).

The Code did not purport to limit or restrict out-of-state firms in securing licenses to *collect* waste, but it did prevent both local and interstate firms from crossing over into offering *disposal services* to their collection customers.

The Town was separating the collection and disposal markets, and further separating residential collection from commercial collection. The Improvement provided both collection and disposal to residences. The Smithtown Code was designed to leave the private commercial waste collection market intact, while eliminating the entire disposal market.

With respect to the purchase and sale of services in the taxing districts of Babylon and Smithtown, the Court of Appeals was accurate in identifying the different spheres of economic activity, and the different municipal roles, as regulators or participants, played in each. As noted above, Babylon regulated when it created its commercial collection district, acted as a participant buyer when it awarded a collection contract, acted as a participant buyer when it purchased disposal capacity from Ogden, and acted as a participant seller when it resold incinerator capacity back to its collection contractor.

Similarly, Smithtown acted as a participant buyer when it

purchased collection services from SSC for its residential district, and would presumably have been found to be a regulator, like Babylon, when it eliminated private service and established the Improvement, had the question been raised.

But the Court was wrong in viewing the Code other than as a regulatory means to eliminate the private market, and in failing to carefully examine the disposal transactions which replaced that market.

As a result of the prohibition of private disposal services, the Town itself stepped directly into the position of exclusive seller of disposal service to local generators and haulers. In providing that service, the Town not only became a party to a business transaction with generators and haulers, but entered the zone of responsibility for the proper disposal of that waste under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, CERCLA and New York state law. This was the intended result of the prohibitive regulation.

Having taken on disposal responsibility through the police power, the Town then turned to outside sources to purchase the services of specialists in waste disposal. With Huntington, it purchased the exclusive right to use the disposal capacity of a 750 ton-per-day waste-to-energy facility in exchange for liability on $176 million in public bonds. Consistent with its prohibition of retail sales of disposal services, the Town also prohibited Ogden, as facility operator, from doing business with private haulers or generators — its only customer was the Town.

Where Babylon and Smithtown eliminated collection markets by organizing service districts financed through charges assessed on the property tax bill, the Court recognized that each had undertaken to provide those services as a

government function. (*Babylon* at 24a-25a). It found regulation in the elimination of private services, but properly viewed it as non-discriminatory. At this point, again properly, it recognized that government possessed the choice of performing the service with municipal workers, or hiring outside contractors. As the providers of services in both taxing districts, it found the Towns to be market participants, able to hire contractors under terms of their choice.

But where the Smithtown Code eliminated the retail disposal market, through the police power, the Court did not take the same approach. This was unwarranted. There is no difference, under the Commerce Clause, between regulations which are effected through the taxing power and those implemented through the police power. Both are regulations which trigger the tests required by *City of Philadelphia* and *Pike*. The private sector is impacted equally whether its business is lost because municipal trucks replace them through a district structure, or they are simply prohibited from performing those services by law. The issue is whether the tax or the law discriminates in favor of local interests and against out-of-state interests.

In reviewing the Smithtown Code, the Court discussed at length the reasons supporting a finding that Smithtown was acting as a regulator toward the collection industry, focusing on the use of the police power to impose criminal sanctions on violators. But rather than viewing the regulation as the elimination of a private sector market, and inquiring as to which local or out-of-state economic interests were favored or penalized by the prohibition, the Court reviewed the decision of this Court in *Carbone* and found itself "compelled" to rule that the Smithtown Code facially discriminated against interstate commerce. (*Smithtown*, SSC Petition at 26a). This finding was inconsistent with the facts in the record and with

the Court of Appeals' otherwise careful analysis.

D. Smithtown's Relationship With Ogden Is Distinguishable from Clarkstown's Relationship With Its Transfer Station Operator.

The Court of Appeals did recognize the key fact in Smithtown's contractual relationship with Ogden:

> In return for paying the Service Fee, Smithtown and Huntington own *exclusive* rights to decide what waste may be disposed of at the incinerator, and thus to charge tipping fees for garbage that is dumped there.

(*Smithtown*, SSC Petition at 7a) (emphasis added).

SSC's business transaction in buying disposal services (for commercial waste) is conducted with Smithtown directly. (Joint Statement of Stipulated Facts ¶ 8 at 55a).[7]

The fact that Ogden has no rights to accept waste, or compensation, from anyone other than the Towns, is critical to the inquiry here. Like Babylon, Smithtown uses municipal tax dollars (as well as fee revenues) to repay public bonds and pay Ogden to operate the incinerator. Ogden operates solely as a contractor to Smithtown, and neither does business with SSC, nor competes with SSC for the business of local waste generators or haulers. It is, therefore, not a favored seller of disposal services with whom local companies are required to

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7. Smithtown Code § 177-83 (D) sets forth the tipping fees at the various Town facilities, including the incinerator, and provides for payment by all licensees to the Town.

do business. Local companies are required to do business with the Town.

Logically and temporally, the incinerator contract follows, and fulfills, the responsibility for disposal assumed by the Town when it eliminated private disposal transactions. Ogden stands precisely in the same position in Smithtown as it stands in Babylon — a contractor hired through government procurement to assist in the provision of government services.

With the local ordinance at issue in the *Carbone* case, the Town of Clarkstown attempted to provide for the disposal of its citizens' waste by requiring the purchase of disposal services by local generators and haulers from a single private entity which had been designated by the town. Clarkstown's regulation compelled a transaction between private parties — the direct purchase by waste generators and haulers of disposal services from the town's designated private transfer station operator. By that approach, Clarkstown could ensure that *someone* would properly dispose of local waste, but could avoid becoming a party to the transaction itself.

> The cost of building the transfer station was estimated at $1.4 million. A local private contractor agreed to build the facility and operate it for five years, after which the town would buy it for one dollar. During those five years, the town guaranteed a minimum waste flow of 120,000 tons per year, *for which the contractor could charge the hauler a so-called tipping fee of $81 per ton.*

Carbone, 114 S. Ct. 1677 at 1680 (emphasis added).

The Court of Appeals in the decision below failed to take account of the four key differences which distinguish Clarkstown's manipulation of the private market from Smithtown's direct provision of exclusive municipal disposal service.

(1) Unlike Clarkstown, Smithtown directly transacted the sale of disposal service to its local haulers and generators.

(2) Unlike Clarkstown, Smithtown prohibited all private sales of disposal services in the Town, including any transactions by its incinerator operator.

(3) Unlike Clarkstown, Smithtown directly assumed responsibility under RCRA and CERCLA for the ultimate disposition of its waste.

(4) Unlike Clarkstown, Smithtown directly assumed responsibility for the cost of construction and operation of its incinerator, whether or not it would use the facility, and not merely as a contingent responsibility in the event the private operator was unsuccessful.

Clarkstown, in short, did not eliminate the private market for waste disposal services. It eliminated all private interests in that market *but one*. Clarkstown's regulation did not place it in the waste disposal business.[8] Its promise was merely to

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8. While Clarkstown had the option of buying the transfer station for one dollar after five years, it would have little to gain and much to lose by doing so. By setting up a private entity to collect the bills and take the risks in shipping and disposing of the waste, Clarkstown could avoid the responsibilities of being in the waste business while feeling secure that the job was being done. If its scheme had worked as planned, the sensible course would not have been to buy the facility, but simply make the same deal with another firm.

enforce an ordinance compelling its citizens to transact business with a private firm, thereby relying on the private marketplace to solve its waste problem.

Consequently, this Court found the Clarkstown ordinance to be analogous to the unconstitutional processing laws previously struck down in *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *Minnesota v. Barber*, 136 U.S. 313 (1890); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *Johnson v. Haydel*, 278 U.S. 16 (1928); *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1157 (1948); *Pike v. Bruce Church, Inc.*, and *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237 (1984):

> just one more instance of local processing requirements that we long have held invalid.... The essential vice in laws of this sort is that they ban the import of the processing service.... Put another way, the offending local laws hoard a local resource — be it meat, shrimp or milk — for the benefit of *local businesses* that treat it.

Carbone, 114 S. Ct. at 1682-83 (emphasis added).

Smithtown, on the other hand, destroyed any benefit to local businesses by banning the service entirely. It then purchased disposal capacity from Huntington and Ogden outright, without contingencies. Its regulation was not needed, as in Clarkstown, to channel business to its contractor "to ensure the long-term survival of the designated facility," *Carbone*, 114 S. Ct. at 1684, because Ogden's and Huntington's positions were secured by the MCA. It makes no difference whether Smithtown utilizes taxes, benefit assessments, user fees or any other lawful revenue source to

meet its facility obligations. The critical distinction is not how the purchased services are paid for, but *who purchases the services*. When Ogden has sold its capacity to Smithtown, only Smithtown can resell that capacity to the generators and haulers. These are two direct municipal transactions between the Town and Ogden on one side, and the Town and the haulers on the other. There is no forced private transaction because the government stands in the center. This is the difference between Clarkstown's establishment of a favored position for its vendor in the private marketplace and Smithtown's total preemption of the marketplace in favor of public service. Clarkstown's regulation discriminates, Smithtown's does not.

II.

THE BENEFITS OF EXCLUSIVE MUNICIPAL DISPOSAL SERVICE OUTWEIGH ANY INCIDENTAL BURDENS THE SMITHTOWN CODE MAY PLACE ON INTERSTATE COMMERCE.

Where a regulation does not discriminate against interstate commerce, the next question is whether it imposes any burden on commerce which is "clearly excessive in relation to the putative local benefits" of the law. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

This Court has repeatedly recognized the severe and difficult problems facing local and state governments in solid waste management. Indeed there is little dispute that the chronic intractability of the problem gives government a substantial interest in the search for solutions. *See C&A Carbone v. Town of Clarkstown*, 114 S. Ct. 1677; *City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531 (1978); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill,*

Inc. v. Michigan, 504 U.S. 353, 112 S. Ct. 2019 (1992) and *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 114 S. Ct. 1345 (1994).

The search for solutions has led to a constitutional debate over the respective roles of the public and private sectors in that effort. This case does not require the weighing of the particular environmental, technical or economic proposals put forth by the private sector on one hand and government on the other. It requires rather an inquiry into the effect on interstate commerce of a local community's refusal to allow the waste problem to be left to the marketplace. Smithtown has insisted on a collective approach to waste disposal implemented by government action —first in the prohibition of private approaches and then through direct public works.

While private sector waste disposal services in Smithtown have not been historically utilized to a great extent, their prohibition in retail transactions by the Smithtown Code can be assumed to have worked a disruption on those offering the service. The disruption, however, is limited to the form of the market in which they were sold, not to any interference with local demand. Demand is still present, but is manifested through the purchasing power of a larger customer, the government, rather than the individual waste generators who would otherwise be purchasing the service.

In the area of waste services, the fact that a local government enters, and even monopolizes, the field of collection or disposal works little harm on interstate commerce. To the contrary, the burden is likely to fall more heavily on local interests as municipalities turn to the national market to purchase skills and technical expertise.

The huge investments in waste disposal facilities made by

American states and cities over the past decade have been driven by technological innovation and strict new regulatory requirements. Municipalities have bought that innovative technology largely from the interstate marketplace, either in the form of facility construction, as Smithtown did with Ogden, or in the form of waste export to other parts of the country. When this happens, local firms lose business.

While replacement of private retail services with public services may work a great change in the marketplace, the change itself does not implicate the Commerce Clause. Interstate commerce is protected by the Clause, not the interests of particular firms. *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 98 S. Ct. 2207 (1978).[9]

In the present regulatory and economic climate, a municipal decision to remain in the waste disposal business cannot and is not made lightly. A city must balance the risks involved in assuming responsibility for waste disposal — particularly under CERCLA —with the benefits it can pass on to its citizens.

The primary public benefit in municipal service is citizen choice. The economies of scale in waste collection mandate the use of trucks capable of servicing scores, if not hundreds of customers per day. There is no practical way for a private collection firm to accommodate the diverse wishes of any two customers when it comes to choosing which of several landfills or other facilities will be used for disposal. Consequently, the hauler chooses for the customer. The customer, however, remains potentially liable under CERCLA

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9. *See also Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S. Ct. 1515 (1945); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 101 S. Ct. 1309 (1981); *Kleenwell Biohazard Waste v. Nelson*, 48 F.3d 391 (9th Cir. 1995); *cert. denied*, 115 S. Ct. 2580 (1995).

if his waste is later found to have been dumped in a problem facility. *See B.F.Goodrich & Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992).

Municipal disposal, with or without public collection service, allows the citizen to exercise a choice he would not otherwise have in selecting the manner in which his waste is to be ultimately disposed. That choice is not individual, but legislative. There are few areas of civic life which engender greater public participation, and controversy, than public waste disposal decisions. Often municipal facilities cost more than private projects. This phenomenon is at least partly the result of the collective choice made by the community in the public selection of method and safeguards.

SSC in this case, like other waste service firms in other cases, has seized on the language of this Court's ruling in *Carbone*, where, describing the flawed ordinance at issue, the Court stated, "The ordinance thus deprives out-of-state businesses of access to a local market." 114 S. Ct. at 1681. The dispute here boils down to whether a municipality must provide "access" to its citizen's waste service needs at the expense of its own powers to provide the same services on an exclusive basis.

Government provision of services is a collective political act of people who have banded together, in this case as a Town.

> The genius of our government provides that, within the sphere of constitutional action, the people — acting not through the courts but through their elected representatives — have the power to determine, as conditions demand, what services and functions the public welfare requires.

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 596, 105 S. Ct. 1005 (1985), *quoting Helvering v. Gerhardt*, 304 U.S. at 427, 58 S. Ct. 969 (Black, J.) (1938).

The sovereign powers of the states, and the role of the states in our federal system are as much at issue here as they were in *Garcia*, and other tests of the scope of Congressional power under the affirmative aspect of the Commerce Clause, *e.g., New York v. United States*, 112 S. Ct. 2408 (1992). The notion that interstate economic interests have a constitutional entitlement to "access," not merely to private markets, but to municipal service areas, is an intrusion on the sovereign power of state and local government, guaranteed by the Tenth Amendment, to provide the public services which they deem necessary. It is a gross misreading of *Carbone* to include public services within the concept of "local markets" open to competition from interstate economic interests. Where the private sector feels that municipal policy on services may be ill-advised, the remedy is found in the political process, not in the assertion of a constitutional entitlement to "access."

The Town elected to address its solid waste problems by eliminating private residential collection service, by retaining private commercial collection service under license, and by eliminating private disposal service, in favor of uniform public disposal. The Town submits that the *Carbone* decision cannot be read to foreclose its ability to make those choices.

This case presents this Court with the opportunity to resolve much of the ongoing debate over the limits of municipal power to provide waste services to their citizens. Smithtown petitions the Court to do the following:

1. Recognize that local government may separately regulate collection services and disposal services.

2. Recognize that municipal regulations which entirely preempt the field of waste disposal, whether through exercise of the taxing power or the police power, treat local and out-of-state interests the same, and do not discriminate against interstate commerce.

3. Recognize that municipalities which directly provide waste disposal services to their citizens are market participants when they procure the services of outside contractors to assist them.

CONCLUSION

The Cross-Petitioner Town of Smithtown respectfully requests this Court to grant the Cross-Petition and hear argument as to whether the decision of the United States Court of Appeals for the Second Circuit should be reversed as to the Smithtown Code.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1818, 1814—August Term, 1994

(Argued: April 12, 1995 Decided: September 19, 1995)

Docket Nos. 95-7129, 7131

USA RECYCLING, INC.; FRIENDLY CARTING, INC.; JOSEPH CARIONE; ANGELO CARIONE; JEAN I. CARIONE; LOUIS CARIONE; and CARL R. FUCCI,

Plaintiffs-Appellees,

—v.—

TOWN OF BABYLON; TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2; TOWN BOARD OF THE TOWN OF BABYLON; RICHARD H. SCHAFFER, Supervisor; FRANCINE V. BROWN, Councilwoman; PATRICK HAUGEN, Councilman; ROBERT KAUFOLD, Councilman; ANTHONY TAFURI, Councilman; and BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

Defendants-Appellants.

A. A. & M. CARTING SERVICE, INC.; FARMINGDALE CARTING SERVICE, INC.; NATALE PEPE WASTE CORP.; PGS CARTING CO., INC.; JOSEPH S. CELANO;

MARIANNE CELANO; JC INDUSTRIES, INC.; C.B.S. RUBBISH CO., INC.; FARMINGDALE INDUSTRIAL PARK ASSOCIATION; MINERSFUEL COMPANY, INC.; RESOURCE CONSERVATION CORP.,

Plaintiffs-Appellees,

—v.—

TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2, also known as Commercial Waste Collecting and Recycling District; TOWN BOARD OF THE TOWN OF BABYLON; RICHARD H. SCHAFFER; BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

Defendants-Appellants.

Before:

NEWMAN, *Chief Judge*,
VAN GRAAFEILAND and CABRANES, *Circuit Judges*.

Appeal from an order of the United States District Court for the Eastern District of New York (Thomas C. Platt, *Chief Judge*), granting appellees' motions for preliminary injunction. Appellant Town of Babylon precluded businesses from individually hiring garbage haulers and instead hired a single hauler (co-appellant BSSCI) to collect all garbage within the town's newly created commercial garbage district. The Town permitted the hauler to dump garbage for free at a local incinerator, which the Town owned exclusive rights to use. To

finance this system, the town assessed a flat tax on all commercial property and charged user fees to generators of commercial waste. Various plaintiffs challenged this system in two separate actions.

In a consolidated ruling, the district court held that Babylon's waste management system violated the "dormant" Commerce Clause of the United States Constitution, and accordingly entered a preliminary injunction. We reverse on several grounds. First, the town's assumption of garbage hauling duties neither discriminated against nor imposed any undue burden on interstate commerce, since all private garbage haulers—both local and out-of-state—were equally excluded from the local garbage market. Second, the Town's hiring of independent contractors to provide municipal services constitutes "market participation" that is free from the limitations of the Commerce Clause. Finally, preliminary injunctive relief was inappropriate in light of the district court's finding that plaintiffs would not suffer irreparable harm.

Reversed.

FRANK L. AMOROSO, Nixon, Hargrave, Devans & Doyle, Garden City, N.Y., *for municipal defendants-appellants.*

ANTHONY E. CORE, Mineola, N.Y., *for defendant-appellant BSSCI.*

BETTY JO CHRISTIAN, Steptoe & Johnson, Washington, D.C., *for plaintiffs-appellees A. A. & M. Carting Service et al.*

FREDERICK EISENBUD, Cahn, Wishod & Lamb, Melville, N.Y., *for plaintiffs-appellees USA Recycling, Inc., et al.*

(Gordon J. Johnson, Deputy Bureau Chief, Environmental Protection Bureau, John J. Sipos, Assistant Attorney General, Dennis C. Vacco, Attorney General of the State of New York, for *Amicus Curiae* State of New York).

JOSÉ A. CABRANES, *Circuit Judge*:

For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States. At their option, cities may provide garbage pick-up to their citizens directly (that is, through town employees or an independent contractor), or they may rely on a closely regulated private market to provide those services. In 1905, the Supreme Court turned away two challenges, brought on takings and due process grounds, to city ordinances in San Francisco and Detroit that gave a single scavenger firm the exclusive right to collect and dispose of city garbage. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905). Although in neither of these cases did the Court address whether the municipal waste systems comported with the Commerce Clause, we squarely face that question today.

The Town of Babylon, New York, has elected to take over the local commercial garbage market. Rather than assemble a municipal waste disposal bureaucracy and purchase directly the necessary equipment, the Town has

hired one private company to pick up all commercial garbage, and another to operate an incinerator where that garbage is burned. Businesses and commercial property owners finance this system by paying the Town flat property taxes and user fees tied to the amount of garbage they generate. No private companies, local or out-of-state, may collect commercial garbage in Babylon.

The plaintiffs in these consolidated cases argue that the Supreme Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), has stripped local governments of their long-settled authority to collect and dispose of town garbage. In *Carbone*, the Supreme Court struck down a municipal ordinance that required private garbage haulers to process all town garbage at a single, privately owned local transfer station. Likewise, the present plaintiffs argue, Babylon has in effect created monopolies in the waste collection and disposal markets by taking over both markets and then hiring independent contractors to provide services on the Town's behalf. This system, they contend, discriminates against interstate commerce and therefore violates the Commerce Clause.

We disagree. Babylon's waste management plan, which so closely resembles those approved by the Supreme Court in *California Reduction* and *Gardner*, neither discriminates against, nor imposes any incidental burdens on, interstate commerce. In reaching that conclusion, we reject the plaintiffs' contention that the *Carbone* decision fashioned from the "dormant" Commerce Clause a new, and unprecedentedly sweeping, limitation on local government authority to provide basic sanitation services to local residents and businesses, on an exclusive basis and financed by tax dollars. Such a

limitation, to borrow the words of the Supreme Court, "would interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing governmental largesse. A healthy regard for federalism and good government renders us reluctant to risk these results." *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (citation omitted).

The United States District Court for the Eastern District of New York (Thomas C. Platt, *Chief Judge*) entered a preliminary injunction against the Town of Babylon's implementation of its waste management plan. The court held that plaintiffs in these consolidated cases, *USA Recycling* and *A. A. & M. Carting*, had demonstrated that their challenge to the Town's system was virtually certain to succeed in light of the Supreme Court's recent decision in *Carbone*, 114 S. Ct. at 1682-84. We find that plaintiffs have failed to demonstrate a likelihood of success on the merits, because Babylon's system does not violate the "dormant" Commerce Clause. The district court also erred by granting injunctive relief despite its explicit finding that plaintiffs will not suffer irreparable harm from implementation of Babylon's new waste management system. Because plaintiffs have not made the requisite showings for preliminary injunctive relief, we reverse.

I. FACTS

At the heart of the dispute is the relationship between the Town of Babylon, an incinerator built in Babylon at the behest of the Town ("Incinerator"), and a private garbage hauler hired by the Town (Babylon Source

Separation Commercial, Inc., or "BSSCI"). First, we describe the circumstances surrounding the construction and operation of the Incinerator. Second, we describe the town's creation of a commercial garbage district in the wake of the Supreme Court's decision in *Carbone*. Three aspects of Babylon's waste management plan merit special attention. First, the Town has licensed and hired BSSCI to collect all garbage within the district and has refused to renew the licenses of any other private haulers to collect garbage pursuant to individual contracts with town businesses. Second, the Town permits BSSCI to dispose of town waste at no charge at the Incinerator. Third, the Town finances its commercial garbage collection and disposal system by charging a flat $1500 benefit assessment to commercial property owners, plus a schedule of user fees to individual businesses for garbage they generate beyond a fixed base amount. The facts set forth below are not in dispute.

A. *The Babylon Incinerator*

In the Long Island Landfill Law of 1983,[1] the New York Legislature set deadlines for Babylon and neighboring towns to shut down their municipal dumps, which were contaminating the aquifer that serves most of Long Island. Because closing its landfill would leave Babylon with a shortage of garbage disposal options, the town began to consider building a garbage incinerator. This choice was consistent with the State of New York's articulated policy preference for incinerators (or "resource

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[1] 1983 N.Y. Laws 299 (codified at N.Y. ENVTL. CONSERV. LAW § 27-0704 (McKinney 1984)). The Long Island Landfill Law phased out the practice of landfilling raw garbage, prohibited development of new landfills in deep flow groundwater recharge zones, and designated resource recovery, incineration, or composting as the preferred alternatives for disposal of municipal solid waste.

recovery facilities," as they are also known) over landfills, because "trash-to-ash" facilities reduce the volume of solid waste, put garbage to productive use by generating electricity, and were deemed to be less harmful to the environment. *See* N.Y. ENVTL. CONSERV. LAW § 27-0106 (McKinney Supp. 1995).[2] To promote its hierarchy of recycling and disposal preferences, New York created a statutory framework that enables towns to contract with private companies to build and operate incinerators and other solid waste management facilities. N.Y. GEN.

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[2] Section 27-0106 provides as follows:

> In the interest of public health, safety and welfare and in order to conserve energy and natural resources, the state of New York, in enacting this section, establishes as its policy that:
>
> 1. The following are the solid waste management priorities in this state:
>
> (a) first, to reduce the amount of solid waste generated;
>
> (b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
>
> (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that can not be economically and technically reused or recycled; and
>
> (d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the department.
>
> 2. State government must make an essential contribution to the development and implementation of environmentally, economically and technically viable solid waste management programs through fulfilling its responsibilities to provide programs which promote waste reduction and the expansion of markets for recovered materials, clearly articulated, responsive and consistently applied regulatory structures, and a full range of technical assistance to local governments. A state-local partnership, in which the basic responsibility for the planning and operation of solid waste management facilities remains with local governments and the state provides necessary guidance and assistance, must be forged.
>
> 3. This policy, after consideration of economic and technical feasibility, shall guide the solid waste management programs and decisions of the department and other state agencies and authorities.

MUN. LAW § 120-w (McKinney 1986 & Supp. 1994). The State Legislature also passed a law specifically authorizing Babylon to enter into contracts to build a garbage incinerator. 1985 N.Y. Laws 478 § 4(1).

With state approval (if not encouragement) in hand, and in accordance with the bidding procedure detailed in New York General Municipal Law § 120-w(4)(e) (McKinney 1986),[3] Babylon solicited proposals from more than sixty-nine companies in eighteen states and Canada to construct and operate the Incinerator. Out of the five companies that submitted bids, Ogden Martin Systems, Inc. ("Ogden") was awarded the contract. Ogden is a New Jersey corporation with a Delaware parent.

To finance construction of the Incinerator, the Town of Babylon Industrial Development Agency (the "Agency"), a "public benefit corporation" created under New York law and controlled by the Town, issued $88.9 million in tax-exempt bonds.[4] The land on which the

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[3] New York General Municipal Law § 120-w(4)(e) (McKinney 1986) sets forth a detailed bidding process for such contracts, indicating what information must be included in bid proposals, requiring notice and comment on the town's request for proposals, and establishing guidelines for evaluating submitted bids.

[4] *See* N.Y. GEN. MUN. LAW §§ 850-888 (McKinney 1986 & Supp. 1994) (describing purpose, organization, and general powers of industrial development agencies); *id.* § 907-a (McKinney 1986) (establishing Babylon IDA). Under New York law, the purposes of an industrial development agency

> shall be to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing industrial, manufacturing, warehousing, commercial, research and recreation facilities including industrial pollution control facilities, educational or cultural facilities, railroad facilities and horse racing facilities and thereby advance the job opportunities, health, general prosperity and economic welfare of the people of the

Incinerator was built is owned by the Town, leased to the Agency, and subleased to Ogden. The Incinerator itself is owned by the Agency and leased to Ogden, which operates the facility.

Under a 1985 Service Agreement between Babylon and Ogden (the "Agreement"), the Town has an unconditional obligation to pay Ogden a Service Fee for operating the Incinerator, regardless of whether any garbage is processed there. Through the Service Fee, Babylon pays for debt service on the bonds, operation and maintenance expenses, and various pass-through costs including trustee fees, payments in lieu of taxes, and the cost of transporting and disposing of ash. Under the Agreement, the Town holds exclusive rights to accept garbage for disposal at the Incinerator, and to set and collect fees for such disposal. Although Ogden controls the day-to-day operations of the Incinerator, the company is required to process whatever garbage the Town accepts for disposal. The Agreement requires Babylon to deliver a minimum of 225,000 tons of garbage each year to the Incinerator.

B. *Babylon's Pre-*Carbone *Garbage Collection and Disposal System*

In 1987, to ensure the financial viability of its Incinerator, the Town passed a flow control ordinance that required all solid waste collected within Babylon to be disposed of at a location designated by the Town. BABY-

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state of New York and to improve their recreation opportunities, prosperity and standard of living . . . .

Id. § 858. The Agency's governing board is appointed by the Babylon Town Board, and each member "serve[s] at the pleasure of the appointing authority." *Id.* § 856(2).

LON CODE § 133-40(A) (1991).[5] Babylon designated its Incinerator as the only permissible disposal site, and required garbage haulers to pay "tipping fees" to the Town for each ton of garbage delivered there. The revenues from these fees offset some of Babylon's costs under its Agreement with Ogden.

In 1994, however, the Supreme Court struck down a similar flow control ordinance enacted by another New York municipality that had required the processing of all solid waste in town at a local, privately owned transfer station. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994). In light of that decision, Babylon determined that it should no longer enforce its own flow control ordinance, and it looked for a new way to finance its Incinerator.

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[5] The New York State Legislature specifically authorized Babylon to enact such a flow control ordinance.

> [T]he town of Babylon is authorized to adopt and amend a local law to be known as the solid waste management law. Such law shall provide for the management on a town-wide basis of all solid waste generated within the town of Babylon. . . .
>
> § 2. It is hereby declared to be the policy of the state of New York with respect to the collection, transportation, delivery, storage, processing and disposal of solid waste in the town of Babylon, in the county of Suffolk, to displace competition with regulation or monopoly public service. In furtherance of this policy, the town of Babylon is hereby authorized to adopt a local law (1) to exclusively control all solid waste and all energy and materials derived therefrom, including without limitation the collection, transportation and delivery of solid waste to a designated resource recovery facility or facilities within the town of Babylon for storage or processing or for any other disposition or handling; and (2) to provide for the establishment and collection from time to time of charges as compensation for the service of disposing or handling of such solid waste, all in order to assure a regular solid waste collection and disposal or handling service for the people of the town of Babylon.

1985 N.Y. Laws 478, §§ 1-2.

C. *The Commercial Garbage Improvement District*

In response to the *Carbone* decision, Babylon decided to create Commercial Garbage Collection District No. 2 (the "District"), covering most commercial real estate in town.[6] Uniform municipal collection and disposal of waste generated in the District was designed to replace the multitude of contracts between individual commercial garbage generators and the seventeen haulers licensed to collect commercial waste in Babylon.[7] Based on various cost surveys and a competitive bidding procedure pursuant to N.Y. General Municipal Law § 120-w(4)(e) (McKinney 1986), the Town concluded that it could provide better garbage service to commercial

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[6] The Town described the extent of the District in its Final Request for Proposals for commercial waste collection and recycling services:

> The Commercial Garbage District encompasses the entire geographic area of the Town of Babylon, and includes all parcels not included in the Residential Solid Waste District (all improved residential parcels, 3 families or less) and *excluding* the Incorporated Villages of Amityville, Babylon and Lindenhurst; all vacant residential land; all land (improved and unimproved) owned by the United States Government, State, County, Town and Villages; but *not* schools, fire, ambulance, water and library districts. Within the geographic limits of the unincorporated Town of Babylon, the Town classification of property in June 1994 showed fewer than 7,000 parcels which would comprise the Commercial Garbage District.

Final Request for Proposals at 3-4.

[7] In 1986, the Town created a Residential Garbage Improvement Area (the "Residential District") to provide municipal garbage collection and disposal services to all town residents, pursuant to New York Town Law §§ 54, 198 (McKinney 1965 & Supp. 1986). The Residential District consists of the unincorporated area of the Town outside the Villages of Amityville, Babylon, and Lindenhurst, and outside any previously existing refuse and garbage districts. In December 1987, after another competitive bidding process pursuant to New York General Municipal Law § 120-w(4)(e) (McKinney 1986), the Town contracted with Babylon Source Separation, Inc., to collect residential refuse and to provide recycling services in the Residential District. For reasons that are not clear, the plaintiffs do not challenge the creation of the Residential District.

property at an overall savings of $7 million to $8 million per year to town consumers.

Based on the bids submitted, the Town entered into a five-year Service Agreement with Babylon Source Separation Commercial, Inc. ("BSSCI") to provide garbage hauling services to all improved commercial property within the District. Under the Service Agreement, the Town agreed to grant BSSCI an exclusive license to collect commercial garbage within the District.[8] Each month, the Town must pay BSSCI a base fee of $22.75 per week for basic service to each parcel, plus additional fees for collection of garbage above the base amount.

The Service Agreement permits BSSCI to dispose of up to 96,000 tons of garbage per year at the Incinerator and unlimited amounts of recyclable material at the town recycling facility, all at no charge. If BSSCI dumps more than 96,000 tons at the Incinerator, it is obligated to "pay the prevailing tipping fee to the Town at the time of such delivery." BSSCI has the option to deliver commercial refuse elsewhere, but it must bear those disposal costs itself. Although Babylon retains the right to direct BSSCI to deliver the contract waste to a particular disposal site, in which case the Town is responsible for pay-

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[8] The Town would grant BSSCI the only Class 2 license, which authorizes a hauler to collect and transport all wastes, except construction and demolition debris, within the District. Such a license can be granted only to a carter that has a contract with the Town. Babylon Town Code § 133-14(B) (1995).

Other carters, including plaintiffs, are still eligible to apply for Class 1 and 3 licenses. A Class 1 license authorizes a hauler to collect and transport nonrecyclable waste outside an improvement district, and to collect and transport recyclable waste from the improvement district only "if properly authorized by the property owner." § 133-14(A). A Class 3 license authorizes a hauler to collect and transport construction and demolition debris anywhere in the Town. § 133-14(C).

ing any disposal fees, the Town has not indicated that it wishes to exercise this contractual right.

To finance the provision of collection and disposal services in the District, the Town imposed a $1500 annual benefit assessment against each improved parcel of commercial property within the District. All such parcels are entitled to "basic service" from BSSCI, defined as weekly collection of one cubic yard of commercial refuse and one-half cubic yard of recyclables. The property owner may allocate this basic service to one commercial establishment per parcel. Other businesses on a parcel, and those businesses requiring more than basic service, must pay a user fee for each additional cubic yard of garbage. If a business cannot agree with BSSCI as to how much extra service is needed, a contract monitor appointed by the Town will determine the appropriate service level that the business must receive.

D. ***Proceedings in the District Court***

In mid-December 1994, plaintiffs filed the present actions in the United States District Court for the Eastern District of New York, seeking to prevent Babylon from implementing its contract with BSSCI to provide collection and disposal services in the District, and from failing to renew the plaintiffs' existing licenses to collect garbage on a town-wide basis. The plaintiffs in *USA Recycling, Inc. v. Town of Babylon* (No. 95-7129) include a commercial solid waste management recycling facility, a garbage collection company that is currently licensed to collect garbage in Babylon, several individuals who own commercial property within the District, and an individual who owns a business located in the District (the "USA Recycling plaintiffs"). The plaintiffs

in *A. A. & M. Carting Service, Inc. v. Town of Babylon, New York, Commercial Garbage District No. 2* (No. 95-7131) are an out-of-state waste disposal facility, a motor carrier engaged in interstate transportation of solid waste, five local waste collection companies currently licensed to collect garbage in Babylon, and an association of small businesses that generate waste within the District (the "A. A. & M. Carting plaintiffs").

Plaintiffs claim primarily that the Town's plan to collect and dispose of commercial garbage violates the so-called "dormant" Commerce Clause of the United States Constitution, which limits the states' ability to regulate interstate commerce absent congressional authorization. Specifically, they argue that the exclusion of all private garbage haulers from the commercial garbage collection market, the Town's decision to let its hired garbage hauler dispose of garbage at no charge at the Babylon Incinerator, and the user fees and benefit assessments charged to property owners and businesses within the District add up to a system that impermissibly discriminates against interstate commerce in the waste collection and disposal markets.

On December 30, 1994, the district court held a hearing on a motion for a preliminary injunction in *USA Recycling*, and entered an order applicable to both of the present cases on January 5, 1995. That order denied all pending motions for injunctive relief without prejudice to renewal, but directed the Town to maintain the status quo and to recognize the existing licenses of collection companies pending amendment of the Town Code. Babylon and BSSCI initially filed an appeal and sought an emergency stay of that order from this Court, but then withdrew their appeal.

On January 10, 1995, Babylon amended its Town Code to implement the new plan.[9] One new provision of the Town Code effectuates the exclusive collection provision of the BSSCI Service Agreement: only BSSCI, as the sole collector that has entered into a contract with the Town, is eligible for a license to collect nonrecyclable garbage generated within Babylon's commercial garbage district. Local Law No. 2 of 1995 (to be codified at BABYLON CODE § 133-14(B)). Other provisions make it illegal for an individual commercial waste generator to dispose of its own waste, either by contracting with a garbage hauler that lacks a Town license, or by transporting its own waste without a "special exemption" from the Town Board upon a showing of "exceptional circumstances." Local Law No. 2 of 1995 (to be codified at BABYLON CODE §§ 133-11(B)(3), 133-37). Plaintiffs in both actions amended their complaints and renewed their motions for preliminary injunctive relief.

On February 2, 1995, the district court granted those motions in a consolidated ruling. Guided by the Supreme Court's decision in *Carbone*, the court determined that the plaintiffs' challenge to the Babylon waste management system was likely to succeed on the merits. The court stated that the Service Agreement "gave BSSCI not only a powerful, but virtually an irresistible incentive to dispose of the waste at the town facility," and thus hoarded the local demand for waste collection and disposal services for the benefit of BSSCI and the Incinerator. As a result, the court concluded that the amended Babylon ordinance had the same discriminatory effect on interstate commerce as the ordinance struck down in

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[9] It appears from the record that the Town, at the direction of the district court, has refrained from filing these amendments with the New York Secretary of State, a ministerial act required for the changes to take effect. *See* N.Y. MUN. HOME RULE LAW § 27(3) (McKinney 1994).

Carbone. Despite its explicit finding that plaintiffs would not suffer irreparable harm from their exclusion from Babylon's commercial garbage market, the court entered a preliminary injunction prohibiting the Town and BSSCI from implementing the District garbage collection system.

Babylon and BSSCI appeal from that order. We expedited that appeal, and now reverse.

II. DISCUSSION

A. *Standard of Review*

It is well established in our Circuit that a court may grant a plaintiff preliminary injunctive relief only upon a showing of

> irreparable harm, and either (1) a likelihood of success on the merits of its case or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor.

Polymer Technology Corp. v. Mimran, 37 F.3d 74, 77-78 (2d Cir. 1994) (citation and internal quotation marks omitted). We have explained that

> if the moving party has established the requirements for such an injunction, the injunction may be reversed only if the district court has abused its discretion. A district court may abuse its discretion by applying an incorrect legal standard or by basing the preliminary injunction on a clearly erroneous finding of fact.

Waldman Publishing Corp. v. Landoll, Inc., 43 F.3d 775, 780 (2d Cir. 1994) (citation omitted).

We first review the district court's determination that the plaintiffs had demonstrated a likelihood of success on the merits of their Commerce Clause claim, and then turn to whether plaintiffs have shown that they would suffer irreparable harm.

B. *Likelihood of Success on the Merits*

1. *Commerce Clause Jurisprudence*

The Commerce Clause provides that Congress "shall have Power . . . To regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. "Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). This negative restriction on state power has often been labelled the "dormant" Commerce Clause. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 115 S. Ct. 1331, 1335 (1995).

To determine whether a state or municipal activity violates the dormant Commerce Clause, the Supreme Court has instructed us to undertake two separate inquiries. First, we must determine whether the state is "regulating" the market at all, as opposed to merely "participating" in it. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 436-39 (1980). If the state is buying or selling goods as any private economic actor might, then it is engaging in "market participation" that by definition falls outside the scope of activity governed by the dormant Commerce Clause. *Id.* at 438-39. On the other

hand, if the state activity constitutes "regulation" of interstate commerce, then the court must proceed to a second inquiry: whether the activity

> regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce. As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed.2d 174 (1970).

Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 114 S. Ct. 1345, 1350 (1994) (citations and internal quotation marks omitted).[10]

The party challenging the validity of a state statute or municipal ordinance bears the burden of showing that it discriminates against, or places some burden on, interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). If discrimination is established, the burden shifts to the state or local government to show that the local benefits of the statute outweigh its discriminatory effects, and that the state or municipality lacked a nondiscriminatory alternative that could have adequately protected the relevant local interests. *Id.* If the chal-

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[10] For further discussion of Commerce Clause jurisprudence, we refer the reader to our opinion in *SSC Corp v. Town of Smithtown*, No. 94-9192 (2d Cir. Sept. 19, 1995), filed simultaneously herewith.

lenging party cannot show that the statute is discriminatory, then it must demonstrate that the statute places a burden on interstate commerce that "is clearly excessive in relation to the putative local benefits." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (quoting *Pike*, 397 U.S. at 142).

In accordance with the Supreme Court's instructions, we proceed to decide whether each component of Babylon's waste management system constitutes "regulation" of commerce and, if so, whether such regulation violates the Commerce Clause. We first examine the Town's relationship with businesses and property owners in the District, where it has elected to occupy the entire field of garbage collection. We then discuss in turn the Town's relationships with BSSCI and Ogden.

2. *The Relationship Between the Town and Businesses and Property Owners in the District*

The Town of Babylon has taken over the local commercial garbage collection market. No private haulers may enter into garbage collection contracts with individual businesses. Instead, the Town (through its contractor, BSSCI) provides exclusive collection services within the District. Relying primarily on *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994), the plaintiffs claim that their exclusion from this market facially discriminates against interstate commerce because it favors a single garbage hauler (BSSCI) and a single garbage disposal facility (the Incinerator) over all other in-state and out-of-state competitors. Hence, they argue, the Town's commercial garbage collection system violates the dormant Commerce Clause.

Babylon responds in three ways. First, it argues that its takeover of the local garbage collection market is insulated from Commerce Clause scrutiny because it constitutes "market participation," not "market regulation." Second, the Town argues that even if its assumption of garbage collection duties in the District constitutes market regulation, it has not discriminated in favor of any local company. Rather, it has evenhandedly prohibited local businesses from entering into contracts with *any* garbage haulers—local or out-of-state—and provided uniform garbage collection and disposal as a government service through its agent, BSSCI. Third, the Town argues that its system does not place an undue burden on interstate commerce. We address each of these arguments in turn.

a. *Market Participation/Market Regulation*

As an initial matter, we hold that the Town's decision to replace the private market for commercial garbage collection with uniform municipal collection is subject to the limitations of the dormant Commerce Clause because it constitutes regulation of that market, not participation in it. Babylon has exercised its governmental powers by denying licenses to all garbage haulers but the one hired by the Town, and by establishing civil and criminal penalties for haulers who collect garbage without a license. Because no private actor could engage in such activity, the Town is acting as a market regulator rather than a market participant. *See SSC Corp. v. Town of Smithtown*, No. 94-9192, slip op. at [18] (2d Cir. Sept. 19, 1995). The Town does "participate" in the garbage collection market in a different respect: it buys garbage hauling services from BSSCI. But states and local governments do not enjoy *carte blanche* to regulate a mar-

ket simply because they also participate in that market. *Id.* at [18-19]; *cf. South-Central Timber*, 467 U.S. at 97 (plurality opinion) (holding that Alaska may not regulate timber processing market simply because it participates in timber sales market). Particular state actions that do not constitute "market participation" are subject to the limitations imposed by the Commerce Clause. A state engaging in mercantile activity does not obtain blanket immunity to regulate the market in which it participates, free from the strictures of the dormant Commerce Clause. Courts must evaluate separately each challenged activity of the state to determine whether it constitutes participation or regulation.

b. *Discrimination Against Interstate Commerce*

Although the Town's decision to eliminate the commercial garbage collection market constitutes "market regulation" rather than "market participation," we find that it does not discriminate in any way against interstate commerce. The Town has not favored in-state garbage haulers over out-of-state competitors. *Cf. Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 343-44 (1992) (striking down state tax imposed only on hazardous waste generated outside state but disposed of within state). Nor has the Town handicapped other in-state and out-of-state businesses from competing against a group of local proprietors. *Cf. Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951) (striking down ordinance requiring all milk sold in city to be pasteurized within five-mile radius of city limits). The plaintiffs argue, however, that Babylon is favoring a single local garbage hauler to the detriment of both in-state and out-of-state competitors. In essence, they argue that the Town's exclusion of private garbage haulers and the hir-

ing of a single garbage hauler—whether that hauler is BSSCI or some other company—is nothing more than a crude facade for a flow control ordinance like the one struck down by the Supreme Court in *Carbone*. Babylon, they claim, has conferred on BSSCI the same favored status that Clarkstown bestowed on its local, privately owned transfer station. We disagree.

No one enjoys a monopoly position selling garbage collection services in Babylon's commercial garbage market, because the Town has eliminated the market entirely. Not even the Town itself remains as a seller in the market. Although the Town is now the lone provider of garbage collection services in the District, it does so as a local government providing services to those within its jurisdiction, not as a business selling to a captive consumer base. Babylon's waste management plan thus differs dramatically from the flow control ordinances struck down by the Supreme Court in *Carbone* and by this court in *SSC Corp.* In both of those cases, the challenged flow control ordinances required local garbage haulers to buy processing or disposal services from a local facility. *Carbone*, 114 S. Ct. at 1680; *SSC Corp.*, slip op. at [3-4]. In Babylon, local businesses do not buy services from anyone. Instead, the Town unilaterally provides garbage service to everyone in the District. Although taxpayers in the District ultimately foot the bill for these garbage services—just as they foot the bill for street sweeping, street lighting, sewage treatment, public schools, and police and fire protection, to name just a few other basic services provided by local governments—the payment of taxes in return for municipal services is not comparable to a forced business transaction that the ordinances in *Carbone* and *Smithtown* required, and that rendered those ordinances discrimi-

natory against interstate commerce. In short, because Babylon is not selling anything, it cannot be considered to be a favored single local proprietor as in *Carbone*.

New York law makes clear that the Town is fulfilling a governmental duty, not making a sale, when it provides garbage services. New York municipalities have a duty to ensure proper collection and disposal of trash for the well-being and health of the community. *Nehrbas v. Incorporated Village of Lloyd Harbor*, 2 N.Y.2d 190, 194-95 (1957); 1979 N.Y. Op. Att'y Gen. (Informal) 237 ("Generally, the removal of garbage is an affirmative duty properly delegated to and imposed upon municipalities."). To fulfill this duty,

> [a] municipality may perform the function of removal directly through its own department; or it may have it performed under a public contract; or it may require a license to be obtained by persons or firms authorized and qualified to perform that function. It is for the municipality, within reasonable bounds, to determine how they shall be collected and removed, or rendered harmless. But it still has the duty to exercise such supervision and control as will prevent danger to public health and injury to the public interest.

P. & A. Carting Co. v. City of New York, 7 Misc. 2d 815, 817 (Sup. Ct., Special Term, N.Y. County 1956) (citation and quotation marks omitted); 1979 N.Y. Op. Att'y Gen. (Informal) 237 ("[M]unicipalities can contract with corporations to perform [the] municipal service [of removing garbage]."). Although a town does not assume the duty to pick up trash itself simply by creating a garbage district, *Industrial Refuse Sys., Inc. v. O'Rourke*, 134 Misc. 2d 45, 52-53 (Sup. Ct. Westchester Cty. 1986),

aff'd as modified sub nom. Pelliccio v. Axelrod, 131 A.D.2d 650 (2d Dep't), *appeal denied*, 70 N.Y.2d 610 (1987), it may certainly take on that duty expressly. Under New York law, when Babylon prohibited local businesses from arranging privately for garbage removal, it had to ensure that garbage would nevertheless be collected and disposed of properly in some other way.[11]

In Babylon, the Town chose to replace private commercial garbage hauling with public garbage collection—provided not by trucks and employees of the Babylon Department of Public Works, but by an independent contractor (BSSCI) hired by the Town. The Town's decision to hire an outside firm to provide services on the Town's behalf is quite unremarkable. State governments have turned to the private sector to "contract out" or "outsource" numerous governmental functions, including services in correctional facilities, the management of concessions in public parks, the operation of mental health facilities, the training of displaced workers, and the operation of toll roads. *See generally* JOAN W. ALLEN ET AL., THE PRIVATE SECTOR IN STATE SERVICE DELIVERY (1989). The same is true of local governments, including in the field of waste disposal. As environmental regulations proliferate, towns may find that their staffs lack the requisite expertise to provide sanitation services in compliance with state and federal mandates. Such expertise may be more readily available in the private sector, from firms that specialize in waste removal. The U.S. Office of Technology Assessment has

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[11] We do not hold that the Town has assumed an enforceable duty to collect or dispose of other types of waste, such as construction and demolition debris, that private haulers are still licensed to collect. Nor do we address the situation of a town that provides garbage collection services but does not exclude those within its jurisdiction from entering into individual contracts for waste collection.

observed that as municipal solid waste systems become more complex,

> municipalities (especially the smaller ones) may be reluctant to assume the primary responsibility for operating a complex business. The large waste management companies that have emerged are sophisticated in the technical aspects of [municipal solid waste] management and financially capable of accepting some of the associated business risks. At the municipal level, the prospect of contracting out increasingly complicated waste management services has become particularly attractive.

OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, FACING AMERICA'S TRASH: WHAT'S NEXT FOR MUNICIPAL SOLID WASTE 54 (reprint ed. 1991). Another reason why local governments often contract out is to avoid investing large sums of money into capital equipment—equipment that might be more cheaply obtained by financing schemes that involve, among other things, the hiring of outside firms. *See, e.g.*, ALLEN ET AL., *supra*, at 4-5. One survey has shown that, at least in some circumstances, it is more expensive for a local government itself to collect town garbage than for the government to hire a private contractor to do so. BARBARA J. STEVENS, HANDBOOK OF MUNICIPAL WASTE MANAGEMENT SYSTEMS 9 (1980). While the law may distinguish between activities performed by the Town itself and those performed by independent contractors for purposes of tort liability or agency law, plaintiffs offer no authority for the proposition that these distinctions have any constitutional significance.

The Town has followed the example set by countless other local governments by hiring a private contractor to

collect commercial garbage on its behalf. Pursuant to its contract with the Town, BSSCI must collect all garbage put out for pick-up by all "eligible customers"—that is, all commercial establishments on improved property within the District. The Town, in turn, can levy and collect unpaid user fees and benefit assessments as it would collect any other delinquent local tax. N.Y. TOWN LAW § 198(9)(c) (McKinney 1987); 1987 N.Y. Op. Comptroller 86-88, at 3.

In sum, we conclude that town businesses are not forced to purchase anything from the Town (or its agent, BSSCI)—and that the Town has indeed excluded *all* garbage haulers, including BSSCI, from selling garbage collecting services to businesses in Babylon. The Town's waste management system treats all garbage haulers alike and thus does not discriminate against interstate commerce.

The plaintiffs argue that even if the local government could provide exclusive garbage services to all businesses in the District, it nevertheless discriminates against interstate commerce by financing those services through taxes imposed only on businesses and commercial property within the District, rather than through taxes payable by both residents and businesses on a town-wide basis. In support of this argument, plaintiffs point to the Supreme Court's statement in *Carbone* that if "special financing is necessary to ensure the long-term survival" of a solid waste treatment facility, then "the town may subsidize the facility through general taxes or municipal bonds." 114 S. Ct. at 1684. "General taxes," the plaintiffs contend, are town-wide taxes that " 'are received for the general purposes of the [government], and [that] are, upon proper receipt, lost in the general revenues.' " *Oregon Waste Sys.*, 114 S. Ct. at 1353 (first

alteration in original) (quoting *Flast v. Cohen*, 392 U.S. 83, 128 (1968) (Harlan, J., dissenting)). "Special assessments," by contrast, are imposed only "upon property within a limited area for the payment for a local improvement, supposed to enhance the value of all property within that area." *Illinois Cent. R.R. v. City of Decatur*, 147 U.S. 190, 197 (1893). Plaintiffs contend that the two charges imposed by the Town—the $1500 per-parcel benefit assessment payable by commercial property owners and the additional per-cubic-yard user fees payable by town businesses—are targeted against a "narrowly focused group: potential commercial customers of out-of-state disposal companies," and thereby discriminate against interstate commerce.

In our view, the *Carbone* majority used the phrase "general taxes" as a synonym for nondiscriminatory taxes—that is, taxes that apply evenhandedly to in-state and out-of-state businesses. This interpretation finds support in the *Carbone* majority's citation to *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988) ("Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause]; discriminatory taxation of out-of-state manufacturers does."). The Town imposes its fees uniformly throughout the District upon all commercial property, and upon all businesses on such property. The Town does not differentiate between local and nonlocal businesses. Accordingly, we cannot say that those taxes discriminate against nonlocal taxpayers in favor of local taxpayers.[12]

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[12] There is no reason to assume that by "general taxes" the Supreme Court meant "general revenue taxes"—that is, taxes that are commingled with other municipal revenues. The courts have generally distinguished "special assessments" from "general revenue taxes" not when determining whether those fees discriminate against interstate commerce, but rather, when determining whether they are "fairly related to services pro-

Plaintiffs argue that by taxing only commercial property and businesses, the Town is focusing its tax burdens on the entities more likely to engage in interstate commerce—more likely, that is, than individual town residents. If we were to accept this argument, however, all taxes imposed solely on "commercial" entities would inherently discriminate against interstate commerce, and thus fall under the "virtually *per se* rule of invalidity" under the Commerce Clause. Presumably, such a rule would sweep away everything from state corporate

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vided to the State"—one of four requirements which a state tax must satisfy to survive a Commerce Clause challenge under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). According to *Complete Auto Transit*, a state tax is valid if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* General revenue taxes satisfy the fourth prong of the *Complete Auto Transit* test so long as they are reasonably related to the extent of the taxpayer's contacts with the State. The courts will not inquire as to whether the state's gross receipts from a "general revenue tax" match, dollar for dollar, the benefits returned to the taxpayer. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625-28 (1981). Special assessments and user fees, by contrast, which "are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services," are subject to a somewhat more demanding standard. *Id.* at 622 n.12. Those taxes must not be " 'manifestly disproportionate to the services rendered' " by the state. *Id.* (quoting *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)). Because it is undisputed that the Town uses all of the revenue from its user fees and benefit assessments to defray its expenses in providing garbage services to the District, we cannot conclude that the amount of those assessments is "manifestly disproportionate" to the benefits the Town confers in return. *Cf. Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 719-20 (1972) (upholding state and municipal head tax on airline passengers to defray costs of airport construction and maintenance, in part because plaintiffs failed to show fees "to be excessive in relation to costs incurred by the taxing authorities"). In any event, the plaintiffs do not explicitly press the argument that the Town's two assessments would be invalid under *Complete Auto Transit*, but rather, focus on the fact that the fees are not imposed on both commercial and residential entities throughout the entire Town.

income taxes to corporate franchise taxes. The flaw in the plaintiffs' argument is obvious, however: the local businesses subject to these taxes are equally likely to engage in *local* commerce as to engage in *interstate* commerce. The Town's imposition of benefit assessments and user fees within the District has the legitimate, nonprotectionist goal of apportioning the costs of providing services to that district in an equitable manner. It is in the nature of a local improvement district that the town provides services only to property or persons within the district, and that those entities bear all of the costs of those town services. *See, e.g.*, N.Y. TOWN LAW § 198(9)(b) (McKinney 1987). Under New York law, town boards may establish "improvement districts" to provide any of several enumerated services, "wholly at the expense of the district": sewers, drainage, water, water quality treatment, parks, public parking, lighting, snow removal, water supply, sidewalks, fallout shelters, refuse and garbage collection, aquatic plant growth control, ambulance service, harbor improvement, public dock, beach erosion control. *Id.* § 198 (McKinney 1987 & Supp. 1994).[13] All of these districts are financed

[13] The New York Legislature has also authorized specified local governments to establish other types of improvement districts. For example, any town in Suffolk County is authorized to create a special improvement district for the disposal of duck waste. N.Y. TOWN LAW § 198-a (McKinney 1987). The town may charge users and property owners (usually, those who operate and own duck farms) within the district "duck waste charges" based on the volume of duck waste the Town treats, or upon any other equitable basis that the town board chooses. *Id.* § 198-a(2).

Duck waste districts (whence, presumably, the phrase "down in the dumps") might be said to enjoy a special nexus with foreign commerce. *Cf. Missouri v. Holland*, 252 U.S. 416, 434-35 (1920) (upholding Migratory Bird Treaty Act, 40 Stat. 755 (1918), pursuant to congressional power to implement treaties, and describing migratory birds as a "national interest of very nearly the first magnitude" since they are both "a food supply" and "the protectors of our forests and our crops").

through charges levied against those individuals who benefit from the services provided within that district. In general, the town may levy assessments based on either an "*ad valorem* basis," meaning against property owners in proportion to the value of the property, or a "benefit basis," meaning in proportion to the actual benefit conferred by the district on property. *Id.* § 202. Making local businesses bear the tax bill for municipal services does not discriminate against interstate commerce.

c. *The* Pike *Balancing Test: Undue Burden on Interstate Commerce*

Having concluded that Babylon's assumption of collection duties in the garbage market does not discriminate against interstate commerce, we now must evaluate its commercial waste disposal system under the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In that case, the Court stated that where a

> statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Id. at 142.

We first determine whether the Town has imposed any burdens on interstate commerce. We have explained that the "incidental burdens" to which *Pike* refers "are the burdens on interstate commerce that exceed the burdens on intrastate commerce." *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994) (citing *Clover Leaf Creamery Co.*, 449 U.S. at 471-72); *see also Pacific Northwest Venison Producers v. Smitch*, 20 F.3d

1008, 1015 (9th Cir.) (explaining that "incidental burdens" on interstate commerce include disruption of interstate travel and shipping due to lack of uniformity in state laws, impacts on commerce beyond the borders of the state, or burdens that fall more heavily on out-of-state interests), *cert. denied*, 115 S. Ct. 297 (1994). Although Babylon's takeover of the local commercial garbage market may have some relatively minor effects on both interstate and local commerce, it will not impose any different burdens on nonlocal as opposed to local garbage haulers. That is, while the takeover will result in only one garbage hauler collecting commercial garbage on the Town's behalf in Babylon, the new system will not necessarily increase or decrease interstate commerce in garbage collection. Any impact on interstate commerce would depend on whether a single buyer (the Town), purchasing collection services in bulk for the entire District, would tend to hire out-of-state garbage haulers more often or less often than numerous buyers (Babylon's individual businesses) would have under the old system. Those buyers, like the Town, could have preferred a local garbage hauler to a nonlocal hauler, or vice versa, for any reason: cost, quality of service, or prior business relationship, just to name a few. There is no reason to assume that by shifting all hiring of garbage haulers into the hands of one buyer, the flow of interstate commerce will be reduced, and thereby burdened. In fact, the open bidding process used by the Town to hire a single garbage hauler could readily result in the hiring of an out-of-state garbage hauler—which would actually shift a portion of the garbage collection market *into* interstate commerce. *See Clover Leaf Creamery*, 449 U.S. at 473 (observing that although state statute banning nonrecyclable milk containers would presum-

ably cause market disruptions, "there is no reason to suspect that the gainers will be Minnesota firms, or the losers out-of-state firms"). Accordingly, we find that Babylon has imposed no greater burdens on nonlocal firms than it has placed on local firms.

The plaintiffs also attack the Town's system of benefit assessments and user fees, on the theory that by forcing local businesses to pay the Town for garbage hauling, businesses will be unwilling to hire a private hauler and essentially pay for garbage collection a second time. But the Town's takeover of the garbage collection system, not the tax system, prevents local businesses from hiring private haulers to pick up their garbage. Even if the Town financed garbage collection for the District from "general revenues"—for example, by increasing the town-wide *ad valorem* property tax—businesses would still be prohibited from hiring private haulers. Upon closer scrutiny, it becomes clear that the plaintiffs do not seriously challenge the Town's taxation system. Rather, they dispute the *use* to which the Town has put their tax dollars—to provide garbage collection and disposal services. In this sense, the plaintiffs' challenge to the tax system is really a reformulation of their challenge to the Town's assumption of collection duties in the District. We have already rejected the notion that the Town's provision of exclusive sanitation services places any burdens on interstate commerce, since the Town prohibits *all* garbage haulers from contracting with local businesses. We likewise reject the notion that this local tax system—typical of local tax systems across the country—places any burdens on interstate commerce.

Absent a showing by the plaintiffs that the Towns' waste collection system places any extra burden on out-of-state companies, or on local companies engaged in

interstate commerce, we must conclude that the Town has not imposed any "incidental burdens" on interstate commerce that "are clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

We nevertheless note that Babylon has legitimate—indeed, compelling—interests that are served by its waste management program. In our multi-tiered federal system, local governments have historically borne primary responsibility for ensuring the safe and reliable disposal of waste generated within their borders—a role that Congress has expressly recognized. Resource Conservation and Recovery Act ("RCRA"), § 1002(a)(4) (codified at 42 U.S.C. § 6901(a)(4) (1988)). ("[C]ollection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . . ."). The Town must meet targets for solid waste recycling set by overlapping state and federal mandates. *See, e.g.*, N.Y. GEN. MUN. LAW § 120-aa (McKinney 1986 & Supp. 1994) (requiring local government to enact ordinances mandating source separation of recyclable items from solid waste); *see also* 40 C.F.R. § 256.31 (1994) (requiring states receiving federal assistance under RCRA to plan for source separation, recycling, and resource conservation). Local governments must enjoy some leeway in arriving at creative ways to cope with the solid waste crisis.

3. *The Town's Relationship with BSSCI (the Garbage Hauler)*

The plaintiffs argue that BSSCI is a "single local proprietor" that is favored by Babylon in three ways. As discussed above, they claim primarily that BSSCI enjoys a captive customer base because the Town prohibits other private haulers from competing with it in the local

commercial garbage market. Property owners and commercial enterprises, they contend, are thereby forced to do business with the designated garbage hauler. This, they argue, mirrors the situation in *Carbone,* where the Supreme Court struck down a municipal ordinance that required all town garbage to be processed at a local, privately owned transfer station. 114 S. Ct. at 1683. We need not revisit our rejection of that argument. BSSCI is merely a contractor hired to collect garbage on the Town's behalf, not a favored seller of garbage collecting services with whom local companies are forced to do business.

Plaintiffs raise two further objections to the Town's contract with BSSCI—objections that are somewhat ancillary to the Town's takeover of the garbage collection market. First, the plaintiffs claim that besides a monopoly, BSSCI enjoys an unfair advantage over its competitors because the Town lets it dispose of commercial waste for free at the Incinerator. According to the plaintiffs, this subsidy is comparable to the one invalidated by the Supreme Court in *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994), where Massachusetts had funnelled revenue from a tax on all milk sold in the state to Massachusetts dairy farmers only. Second, the plaintiffs argue that BSSCI has been the special object of the Town's favor, and that the process for selecting a town garbage hauler was skewed in that firm's direction. We are not persuaded by the analogy to *West Lynn Creamery*, or by the plaintiffs' allegations of favoritism towards BSSCI. Both the Town's exercise of its dumping rights at the Incinerator and its hiring of a garbage hauler involve a local government spending tax dollars for the benefit of its citizens—paradigmatic examples of "market participation" that are

not subject to the limitations of the dormant Commerce Clause. Furthermore, we note that even if the Town's actions constituted "market regulation," they would nevertheless pass muster under the Commerce Clause.

a. *Market Participation/Market Regulation*

The Town's decision to let BSSCI dump trash collected in the District for free at the Incinerator constitutes market participation—not discrimination against interstate commerce. As described earlier, the Town effectively owns the Incinerator, and pays Ogden a monthly service fee to operate the facility; the Town owns exclusive rights to dispose of waste there. The Town may exercise those rights as it sees fit. It could sell those rights on the open market. For example, it has entered into a seven-year agreement with the Nassau/Suffolk Hospital Council to burn treated, regulated medical waste at the Incinerator at a rate of $240 per ton. Alternatively, the Town could re-sell those rights only to town residents, just as South Dakota sold cement from its factory only to state residents in *Reeves*, 447 U.S. at 440. Instead, the Town has chosen to give away those rights for free, to dispose of garbage generated by town businesses. Babylon's decision to let BSSCI dump trash for free at the Incinerator therefore constitutes municipal participation in the waste disposal market.

Plaintiffs also argue that the process Babylon used to select a particular garbage hauler was skewed in favor of BSSCI, a consortium of Long Island garbage haulers. In other words, plaintiffs argue that the Town's seemingly neutral takeover of the garbage market was in fact a pretense for handing BSSCI a local garbage monopoly. But allegations that the Town favored BSSCI are irrelevant because the market participation doctrine permits the

Town to hire whatever company it chooses, on whatever terms it chooses, to provide municipal services. As the Supreme Court has held, "Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (footnote omitted); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 207 (1983); *see also SSC Corp.*, slip op. at [14-16]. When a local government decides to provide a municipal service such as garbage collection to its residents, it need not buy garbage trucks or put drivers on the town payroll to pass constitutional muster. Instead, it can hire an outside contractor to provide those services to the town. In *Massachusetts Council of Construction Employers*, for example, the Supreme Court held that the City of Boston could require its building contractors to hire at least fifty percent of their workforce from among Boston residents. 460 U.S. at 214-15. Because all of the employees covered by that mandate were "in a substantial if informal sense, 'working for the city,' " Boston was considered to be simply favoring its own residents through the expenditures of municipal funds. *Id.* at 211 n.7. As the Court stated, "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *Id.* at 208. Nothing in the Constitution precludes a local government from hiring a local company precisely because it is local.

b. ***Discrimination Against, or Burdens on, Interstate Commerce***

In any event, there is no evidence that Babylon (1) is "subsidizing" BSSCI by allowing it to dump town

garbage at the Incinerator for free, or (2) selected BSSCI because it is a consortium of local companies.

The plaintiffs' first argument, that the Town is subsidizing BSSCI by letting it dump garbage for free at the Incinerator, ignores economic reality. Although a customer normally pays its garbage hauler once for two services, collection and disposal, Babylon has purchased those services separately. The Town pays BSSCI to collect town garbage, and Ogden to incinerate it. If Babylon had so desired, it could have charged BSSCI "tipping fees" to dump town trash at the Incinerator—as the neighboring town of Smithtown has done. *See SSC Corp.*, slip op. at [4]. By charging fees at the Incinerator, the Town could eliminate its hauler's arguable incentive to insinuate non-contract garbage into the garbage it dumps for free at the Incinerator. *See id.* at [24]. But if BSSCI had to pay to dispose of town garbage, it would have passed those costs back to Babylon in a higher bid. The Town therefore saves money in its contract with BSSCI by letting it dump for free at the Incinerator. The disposal component of the contract is therefore a wash—not a subsidy—for BSSCI.

Likewise, plaintiffs' allegations of bias in favor of BSSCI are so insubstantial that, even if the Town's hiring of a garbage hauler were subject to the limitations of the dormant Commerce Clause, we would nevertheless conclude that the Town's selection of BSSCI neither discriminated against nor imposed any burden on interstate commerce. Babylon conducted an open bidding process to find a garbage hauler for its District, pursuant to § 120-w(4)(e) of the New York General Municipal Law (McKinney 1986). According to an undisputed affidavit of the Town Comptroller, the Town "aggressively solicited proposers from a national audience" by sending

out bid packages to sixty-nine companies across the country, twenty-four of which were based outside New York. The Town also notified national trade publications of the bidding process, spoke with representatives of industry trade groups such as the Solid Waste Association of North America, and contacted national waste hauling firms by telephone to generate interest in bidding. Furthermore, the Town did not impose any geographical eligibility limitations on those who bid to provide collection services in the District.

The plaintiffs argue that, despite these efforts to generate nationwide interest in bidding, the Town skewed the selection process in favor of BSSCI, which was ultimately awarded the contract to collect commercial garbage within the District. In evaluating the various bids that were submitted, the Town Board placed significant weight on whether the bidder had "[e]xperience identical to or related to that required under this procurement" and "[e]xperience in transition and implementation of services identical to or similar to services required under this procurement." BSSCI received the highest marks in that category, since its principals had already proven their ability to start up a new collection system smoothly and efficiently as members of the consortium serving as the town's garbage hauler in the Babylon Residential District. Furthermore, the draft contract contained in the request for proposals required successful bidders to maintain a local office in Babylon and to keep off-duty garbage trucks "parked securely in a central yard, established by the Contractor, within the Town of Babylon."

Despite the plaintiffs' protestations to the contrary, none of these factors detracted from the nondiscriminatory nature of the Town's bidding process, or resulted

in any undue burdens on interstate commerce. First, plaintiffs neglect to mention that the Town selected BSSCI not only because of its prior experience hauling garbage in Babylon, but also because it submitted the lowest-priced bid. Indeed, the Town considered the relative merits of the submitted bids according to several distinct criteria, including cost, prior experience, ability to provide equipment and support services on the schedule requested by the Town, and ability to meet financial obligations. Second, the requirement of maintaining a secured parking lot and a local office can hardly be considered discrimination against interstate commerce. At most, such a requirement would amount to a burden on nonlocal firms that would have to establish in-town service locations if awarded the contract. But such burdens are *de minimis* when we consider the fact that the chosen hauler must, by the nature of the garbage collection services, pick up garbage *locally*—from businesses situated within the Town. Because the hauler's trucks must be available at a moment's notice to provide back-up service within the District, their geographic proximity to the District is a *sine qua non* of the contract. Furthermore, as the Town explains, local officials can more easily monitor the garbage hauler's performance of its contractual duties—including the maintenance of a dedicated fleet of collection vehicles—if those vehicles are kept in a single location accessible for inspections. Similarly, the maintenance of a local office will also enable consumers to file complaints more readily, as well as to ensure that the contractor is responsive to local needs. In short, the requirement that these support services (purchased by the town) be provided locally places nothing more than a *de minimis* burden on interstate commerce—a burden which is far outweighed by the nondiscrimi-

natory local interests served by ensuring reliable, consistent sanitation service to town businesses.

4. *The Town's Relationship with Ogden (the Incinerator Operator)*

The plaintiffs also argue that the garbage disposal component of the Town's waste management plan impermissibly favors the Incinerator over all other in-state and out-of-state disposal facilities. First, they contend that the Town has effectively guaranteed that all District waste will be disposed of at the Incinerator by letting BSSCI dump commercial waste there for free. This, they contend, has closed off the local commercial garbage market to out-of-state competition. Second, they argue that the benefit assessments and user fees charged by the Town against property and businesses in the District, coupled with the use of those funds to support operation of the Incinerator, constitutes a tax-and-subsidy scheme that discriminates against interstate commerce like the one struck down in *West Lynn Creamery,* 114 S. Ct. at 2205. We address each argument in turn.

a. *Market Participation/Market Regulation*

First, we conclude that the Town is engaging in market participation both when it purchases incinerating services from Ogden, and when it exercises its rights to use those services by letting BSSCI dump town garbage at the Incinerator for free. The Town acts as a buyer in the market for incinerating services when it uses tax dollars to repay municipal bonds and to pay Ogden to operate the Incinerator. This is a simple act of government procurement. As the Supreme Court has observed, "[t]here is no indication of a constitutional plan to limit the abil-

ity of the States themselves to operate freely in the free market." *Reeves*, 447 U.S. at 437.

Having bought those incinerating services, the Town may use them as it chooses. As discussed earlier, the Town sells some incinerating services to a local hospital council for the disposal of medical waste. Instead of selling the remainder of its rights to use the Incinerator, the Town uses them to dispose of trash that BSSCI collects from the commercial garbage improvement district. (The Town also may reserve some of the disposal rights for garbage from its residential garbage district, but the details of collection and disposal there are not before us.) The Town is acting completely within the proper bounds of its discretion when it charges BSSCI nothing to use those rights.

The district court correctly observed that by letting BSSCI dump garbage for free at the Incinerator, the Town has created "not only a powerful, but virtually an irresistible incentive to dispose of the waste at the town facility." By lowering its tipping fees to zero, the Town has guaranteed a flow of garbage to its Incinerator. But local governments are perfectly free, as market participants, to use economic incentives to benefit local businesses. We repeat the Supreme Court's observation in *Alexandria Scrap* that the Commerce Clause poses no barrier to a state "participating in the market and exercising the right to favor its own citizens over others." 426 U.S. 810. This is perfectly consistent with *Carbone*, as well. Indeed, what some commentators have labelled "economic flow control" is precisely what Justice O'Connor suggested would be fully consonant with the majority's holding in *Carbone*. 114 S. Ct. at 1690 (O'Connor, J., concurring) (suggesting that Clarkstown could have financed its transfer station "by lowering its

price for processing to a level competitive with other waste processing facilities"); *see* Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-*Carbone *World*, 22 FORDHAM URB. L.J. 361, 404 (1995) ("Economic flow control is achieved when haulers deliver solid waste to a facility because the costs of disposal at the facility, including transportation costs and tipping fees, are less than or comparable to those at alternative disposal sites.").

b. ***Discrimination Against, or Burdens on, Interstate Commerce***

The plaintiffs reply that even if the Town's purchase of incinerating services does constitute market participation, its *financing* of those incinerating services through property taxes and user fees nevertheless constitutes an unconstitutional "regulation" of interstate commerce. In support of their argument, the plaintiffs claim that Babylon's taxing scheme is no different from the one struck down in *West Lynn Creamery*. In that case, Massachusetts imposed a facially neutral tax on all milk sold in the state. All of the money collected was then distributed to in-state dairy farmers. The effect of the scheme, the Supreme Court found, was to increase local producers' share of the state milk market. The Court also rejected the state's argument that its program was valid because neither the tax on the one hand, nor the subsidy on the other, independently violated the dormant Commerce Clause:

> [The state's] argument would require us to analyze separately two parts of an integrated regulation, but we cannot divorce the premium payments from the use to which the payments are put. It is the entire program—not just the contributions to the fund or

> the distributions from that fund—that simultaneously burdens interstate commerce and discriminates in favor of local producers. The choice of constitutional means—nondiscriminatory tax and local subsidy—cannot guarantee the constitutionality of the program as a whole.

114 S. Ct. at 2215. Unlike the Massachusetts milk scheme, however, Babylon's financing system does not "subsidize" BSSCI or Ogden. Instead, the Town spends its tax revenues to *purchase* services for town residents—a traditional, and unexceptionable, municipal activity. Babylon buys garbage collection services from BSSCI and incinerating services from Ogden. Nor, as explained earlier, does the Town subsidize BSSCI by letting it dump town garbage for "free" at the Incinerator; rather, the Town pays less to BSSCI in the first place for collecting garbage because BSSCI does not have to pay for garbage disposal. If anyone is "subsidized" by the user fees, it is the municipal treasury—not any private business. And that, of course, is the point of every tax.

Thus, although we agree that the Town's tax system constitutes "regulation," we disagree that it has any discriminatory effect, or that it impermissibly burdens interstate commerce. To the contrary, we believe that the Town of Babylon has taken to heart the Supreme Court's admonition in *Carbone* that if "special financing is necessary to ensure the long-term survival" of the incinerator, then "the town may subsidize the facility through general taxes or municipal bonds." 114 S. Ct. at 1684. Babylon has employed both taxes and bonds. It levies a $1500 flat tax on all improved commercial properties in the district, as well as a "user fee" for each cubic yard of garbage generated on each parcel above a fixed base amount. We believe that both of these fees qualify as the

sort of taxes the Supreme Court had in mind in *Carbone*. Although most municipalities raise the bulk of their funds through *ad valorem* property taxes, many also employ income or sales taxes, as well as special levies designed to pay for specific municipal services like schools, roads, fire fighting, or sewer service. It is not remarkable, therefore, to see a town create a waste control district and to spread its costs among those who reap the benefit of services provided in that district. The $1500 flat property tax is perhaps a rough estimate of the benefit accorded to each parcel of property in the district; but plaintiffs do not contend that it is out of all proportion to the benefit conferred on each parcel. The per-cubic-yard user fee, by contrast, corresponds much more closely to the benefit enjoyed by each waste generator in the District. Each business pays tax on the garbage they generate, above a fixed amount. Not only is this tax fairer than an *ad valorem* tax—because it taxes businesses based on the actual amount of municipal services they consume—but it also creates a greater incentive for businesses to reduce the amount of waste they generate. We cannot take exception to either of these purposes of Babylon's tax system.

5. ***Municipal Reliance on Long-standing Precedent***

Finally, we note that we must decide this case against the backdrop of two venerable, and until now unchallenged, decisions of the Supreme Court. In *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), and *Gardner v. Michigan*, 199 U.S. 325 (1905), the Court upheld the authority of San Francisco and Detroit to grant exclusive rights to collect and dispose of garbage within the city to single scavenger companies, who in turn would incinerate the garbage. The

Court rejected takings and due process challenges to those systems. Justice Harlan, speaking for the Court, spoke of the pressing need for municipalities to enjoy some flexibility in formulating solutions to the waste disposal crises then facing them:

> Many of the questions involved in municipal sanitation have proved to be difficult of solution. There is no mode of disposing of garbage and refuse matter, as found in cities and dense populations, which is universally followed. In some cities garbage receptacles, properly covered, are provided, sometimes by the householder, sometimes by the municipal authorities or the garbage collector. But even such devices often prove to be worthless for want of proper attention to them by householders. Then, the question arises for the consideration of the municipal authorities as to the frequency of the removal of garbage. The practice of not at all uniform. In some cities, it is collected seven times a week; in others, six, four, and three times a week. Again, questions arise as to the mode in which garbage should be collected; and the statement is made by those who have investigated the subject, that while "there appears a well-nigh unanimous demand on the part of health officers, and oftentimes of the public generally, for the municipal collection of garbage," the "problem of garbage disposal has not been solved." . . .
>
> These references to the different methods employed to dispose of garbage and refuse have been made in order to show that the Board had before them a most difficult problem—unsolved by experience or science—as to the best or most appropriate method of protecting the public health in the matter of the disposal of the garbage, refuse and

> other materials found on private premises, and in hotels, restaurants and like places. The State, charged with the duty of safeguarding the health of its people, committed the subject to the wisdom and discretion of the Board of Supervisors. The conclusion it reached appears in the ordinances in question, and the courts must accept it, unless these ordinances are, in some essential particular, repugnant to the fundamental law.

California Reduction, 199 U.S. at 320-21 (citation omitted). These rulings of the Supreme Court have engendered important reliance interests at the state and local level. The New York Court of Appeals, for example, long ago declared that a municipality could pass an ordinance prohibiting the collection of garbage by persons unlicensed by its health department, and then declare that no licenses should be granted except to the person having a contract with the city for the collection of garbage. *City of Rochester v. Gutberlett*, 211 N.Y. 309, 317 (1914) ("Experience has shown that, when there are many collectors of garbage within a municipality acting independently although under license, it is difficult to maintain the supervision necessary to preserve the public health; while, with one contractor acting under a contract pursuant to which he is paid and for the faithful performance of which he is required to give a bond with sureties, the public health can be and is better and more surely protected."); *id.* at 318-20 (relying on *California Reduction* and *Gardner*). The challenges associated with sanitary waste disposal have not diminished in the last ninety years. Local governments have continued to shoulder the primary responsibility for solving waste disposal problems—a role that has been recognized by Congress. *See, e.g.*, Resource Conservation and Recov-

ery Act § 1002(a)(4) (codified at 42 U.S.C. § 6901(a)(4)) (1988) (congressional finding that "collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies" supplemented by federal financial and technical assistance).

We recognize that the Supreme Court was not faced with Commerce Clause challenges to the Detroit and San Francisco waste disposal systems, and that those cases do not dispose of the much narrower issues we are faced with today. *See, e.g., Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) ("Local regulations which would pass muster under the Due Process Clause might nonetheless fail to survive other challenges to constitutionality that bring the Supremacy Clause into play. Like any local law that conflicts with federal regulatory measures, state regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow.") (citations omitted); *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) (distinguishing between Due Process and Commerce Clauses). Yet we cannot brush aside two Supreme Court precedents that dealt with waste disposal systems so similar to the one before us today. If we were to rule in plaintiffs' favor, the municipal garbage systems upheld by the Court in *California Reduction* and *Gardner* would be unconstitutional, and municipalities could no longer undertake the traditional local governmental function of collecting town garbage.

We decline the invitation to derive such a revolutionary proposition from the Supreme Court's decision in *Carbone*—an opinion that described itself as unremarkably invalidating "just one more instance of local processing requirements" that the Court had long held invalid. 114 S. Ct. at 1682. As Chief Justice Marshall once wrote, "an opinion which is to overrule all former

precedents, and to establish a principle never before recognised, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established." *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693). We refuse to undercut the long-standing precedents of *California Reduction* and *Gardner* absent clear indication from the Supreme Court that the Commerce Clause is now to be interpreted to effectively preclude local governments from providing basic sanitation services such as garbage collection on an exclusive basis, and financing those services by taxing local residents.

We therefore conclude that the plaintiffs have failed to state a viable claim under the Commerce Clause, and therefore have not demonstrated that they are likely to succeed on the merits. Furthermore, we note that the defendants moved for dismissal in the district court, that the parties have exhaustively briefed the issues before us, and that the Commerce Clause claims may be resolved as a matter of law. Accordingly, we find that

> this is an appropriate case for invoking the doctrine of *Smith v. Vulcan Iron Works*, 165 U.S. 518, 525, 17 S.Ct. 407, 410, 41 L.Ed. 810 (1897); *North Carolina Railroad Co. v. Story*, 268 U.S. 288, 292, 45 S.Ct. 531, 532, 69 L.Ed. 959 (1925); and *CES Publishing Corp. v. St. Regis Publications, Inc.*, 531 F.2d 11, 15 (2 Cir. 1975), that when on appeal from the grant of a preliminary injunction it appears that the "bill had no equity to support it", 165 U.S. at 525, 17 S.Ct. at 410, a court of appeals should direct dismissal of the complaint.

Friarton Estates Corp. v. City of New York, 681 F.2d 150, 160-61 (2d Cir. 1982); *see Aerojet-General Corp. v.*

American Arbitration Ass'n, 478 F.2d 248, 252-53 (9th Cir. 1973); *see also* 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3937, at 269 (1977) ("On appeal from grant or denial of a preliminary injunction, . . . it may make excellent sense to determine whether the complaint states a claim on which relief can be granted."). We therefore direct dismissal of the plaintiffs' Commerce Clause claims.

C. *Irreparable Harm*

Finally, we address the district court's unusual decision to grant preliminary injunctive relief despite its explicit finding that plaintiffs would not suffer any irreparable harm as a result of the implementation of Babylon's solid waste management plan.

It is settled law in our Circuit that, as a general matter, a plaintiff must make a showing of irreparable harm before a court may issue preliminary injunctive relief. *See Polymer Technology Corp. v. Mimran*, 37 F.3d 74, 77-78 (2d Cir. 1994). Nevertheless, the district court stated that it would "grant the motion for injunction, notwithstanding the fact that I don't think irreparable harm has been shown." We have described a showing of irreparable harm as the *sine qua non* for preliminary injunctive relief, *Buffalo Forge Co. v. Ampco-Pittsburgh Corp.*, 638 F.2d 568, 569 (2d Cir. 1981), and such a departure from established precedent clearly constitutes an abuse of discretion. *See JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990) (reversing grant of preliminary injunction where district court found only "possibility" rather than "likelihood" of irreparable harm).

Although plaintiffs concede that the district court misapplied the standards for granting equitable relief, they nevertheless urge us to comb the record for facts that would support a finding of irreparable harm. It is true that we may affirm "on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993). In this case, however, the district court explicitly found that plaintiffs had *not* demonstrated irreparable harm. We could only affirm the preliminary injunction, then, by determining that the district court's factual finding was "clearly erroneous." Because the record supports the district court's determination that plaintiffs' alleged injuries would be entirely financial—and therefore remediable by an award of money damages—we cannot say that the district court clearly erred when it found that the plaintiffs had not demonstrated irreparable harm.

III. CONCLUSION

This case boils down to two simple propositions. First, towns can assume exclusive responsibility for the collection and disposal of local garbage. Second, towns can hire private contractors to provide municipal services to residents. In neither case does a town discriminate against, or impose any burden on, interstate commerce. The local interests that are served by consolidating garbage service in the hands of the town—safety, sanitation, reliable garbage service, cheaper service to residents—would in any event outweigh any arguable burdens placed on interstate commerce.

In summary, we uphold Babylon's waste management system. We reverse the district court's entry of the pre-

liminary injunction, and dismiss the plaintiffs' claims under the Commerce Clause because:

1. The plaintiffs failed to establish a likelihood of success on the merits, because the Town's waste management scheme does not violate the dormant Commerce Clause; and

2. Evidence in the record supports the district court's finding that plaintiffs will not suffer irreparable harm from implementation of the Town's waste management plan.

Because we dispose of all claims raised by plaintiffs in *USA Recycling, Inc. v. Babylon*, No. 95-7129, we direct the district court to enter final judgment in favor of the Town and BSSCI in that case. The plaintiffs in *A.A. & M. Carting Service, Inc. v. Town of Babylon*, No. 95-713, raise additional claims under various statutory and constitutional provisions. We therefore remand for further proceedings on those claims, consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

94 Civ. 1992 (TCP)

SSC CORP.,

Plaintiff,

- against -

TOWN OF SMITHTOWN, TOWN BOARD OF THE BOARD OF SMITHTOWN, and PATRICK VECCHIO, as Supervisor, TOWN OF SMITHTOWN,

Defendants.

JOINT STATEMENT OF STIPULATED FACTS

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the following statements of fact are true and accurate and may be relied upon by the Court in its determination of the instant motion for partial summary judgment in the above-captioned matter. The contracts, agreements, resolutions and other documents forming the basis for the statements below have been exchanged and are set forth on Exhibit A hereto. Copies of all documents relied upon by the parties shall be provided to the Court. Unless otherwise agreed herein, the documents referred to speak for themselves.

Appendix B

PROCEDURAL BACKGROUND

1. On June 24, 1994, the parties appeared before Hon. Thomas C. Platt, and stipulated to a schedule for the submission of cross motions for summary judgment on those portions of the complaint raising constitutional issues concerning portions of Chapter 177 of the Smithtown Town Code and portions of certain Residential Solid Waste Collection and Disposal Contracts between the parties.

2. Consistent with the foregoing, the parties agreed to prepare a joint stipulation of facts no later than August 1, 1994; to serve cross motions for summary judgment no later than September 15, 1994; to serve reply papers no later than September 23, 1994; and to file all papers on September 23, 1994.

3. It was further agreed that the parties would appear before Judge Platt on September 30, 1994, and argue their respective motions for summary judgment.

STIPULATIONS REGARDING PLAINTIFF AND ITS BUSINESS

4. Plaintiff is a business corporation organized under the laws of the State of New York. It is not a subsidiary of another corporation and does not control any other business entities.

5. Plaintiff is licensed to collect solid waste in the Town of Smithtown and has been so licensed at all relevant times herein.

6. Plaintiff collects waste from commercial customers in Smithtown pursuant to agreements with each such customer.

7. Plaintiff collects residential waste in Smithtown pursuant to Contracts awarded to plaintiff by Smithtown after competitive bidding. Plaintiff services approximately 21,000 homes in seven contract bid areas.

8. Plaintiff pays tipping fees to the Town of Smithtown for disposal of commercial and residential solid waste collected in Smithtown and delivered to the Huntington Resource Recovery Facility. The Smithtown tipping fee for solid waste is $65.00 per ton.

9. Plaintiff has available to it landfills for the disposal of residential and commercial solid waste, which landfills are located outside of the State of New York.

10. The cost of disposal of solid waste at landfills outside of the State of New York has fluctuated over time. The parties agree that such costs have in the past been both higher and lower than the $65/ton tipping fee currently charged by Smithtown, and that at present, out of state landfill disposal costs are lower.

STIPULATION REGARDING THE DEFENDANT AND ITS SOLID WASTE MANAGEMENT SYSTEM

11. Defendant Town of Smithtown is a municipal corporation and political subdivision of the State of New York. Its population is approximately 270,000 and it encompasses 54 square miles.

12. Chapter 177 of the Smithtown Town Code is a local law enacted pursuant to Town Law § 137 and Gen. Mun. Law § 120-bb. Chapter 177 contains, among other provisions, the "flow control" law complained of in this action.

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Section 177-83.D(1) of the Smithtown Town Code, in pertinent part, provides:

> "Commercial acceptable solid wastes collected by the carter shall be delivered to the Huntington Resource Recovery Facility."

Section 177-68 of the Smithtown Town Code, in pertinent part, provides:

> "All carters shall proceed to a designated solid waste management facility along routes designated by the Town Board of the Town of Smithtown."

Section 177-3 of the Smithtown Town Code, provides in pertinent part, that the provisions of this chapter shall apply to residential and commercial solid waste and the collection thereof."

13. On or about October 1991, Smithtown created a Solid Waste Collection and Disposal Improvement pursuant to Article 3A of the Town Law of the State of New York, composed of the residential properties in the Town. The Improvement provides solid waste collection and disposal services to the one, two and three-family residences of the Town through collection Contracts between carters and the Town of Smithtown. Plaintiff holds contracts for seven of ten contract bid areas. Residential units in the Improvement are charged a uniform fee for these services. The Contracts provide in pertinent part, as follows:

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SECTION 1.04 — DISPOSAL OF SOLID WASTE

"A. 1. — All residential solid waste collected by the Contractor under the terms of this Contract shall be transported to and disposed of at solid waste management facilities which are or may be designated by the Town of Smithtown during the term of this Contract."

"B. 2. — All household garbage/refuse collected by the contractor shall be delivered to the Huntington Resource Recovery Facility for disposal."

14. The flow control provisions in the Smithtown Town Code, and the flow control provisions in the Contract, prevent SSC Corp. from disposing of residential and commercial solid waste collected within the Town of Smithtown at landfills located outside the State of New York.

15. On or about December 19, 1989, Smithtown entered into a Municipal Cooperation Agreement pursuant to Article 5G of the General Municipal Law of the State of New York with the Town of Huntington, for the joint provision of solid waste disposal services for the two Towns. The obligations of each Town to the other with respect to use of solid waste disposal facilities are set forth in that document.

16. Smithtown is a lawfully designated planning unit for solid waste management pursuant to Article 27 of the Environmental Conservation Law and has submitted a Solid Waste Management Plan incorporating its various solid waste management strategies, including intermunicipal service and

disposal agreements, to the New York State Department of Environmental Conservation ("NYSDEC") for approval pursuant to law. The Plan is currently under review by NYSDEC.

STIPULATION REGARDING
THE TOWN OF HUNTINGTON FACILITY

17. The Town of Huntington Resource Recovery Facility is a mass-burn waste-to-energy facility which is licensed by the State of New York and authorized to accept certain non-hazardous wastes for disposal. Wastes accepted by the Facility are combusted and utilized to generate electrical energy for sale to the Long Island Lighting Company. The Facility is operated pursuant to an agreement with CE Limited Partnership Inc. a subsidiary of Ogden Martin Corporation, and financed by New York State Environmental Facilities Corporation bonds. The agreements of the various parties and the financial obligations issued for the Huntington Facility are summarized in a certain Offering Statement dated July 15, 1989.

IN WITNESS WHEREOF, counsel for the par-es adopt the foregoing stipulations of fact.

DATED: Hauppauge, NY
August 1, 1994

Respectfully submitted,

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Appendix B

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EXHIBIT "A"

DOCUMENTS TO BE RELIED UPON BY THE PARTIES

1. Chapter 177 of the Smithtown Town Code

2. Residential Solid Waste Collection and Disposal Contract

3. Municipal Cooperation Agreement between the Towns of Huntington and Smithtown

4. Offering Statement of the Environmental Facilities Corporation for the sale of certain bonds for construction of the Huntington Resource Recovery Facility

ADDITIONAL DOCUMENTS RELIED UPON BY THE PARTIES

5. Report Plan and Map for the Provision of a Solid Waste Collection and Disposal Improvement (the Improvement Report")

Appendix B

6. Town of Smithtown Solid Waste Management Plan Vols. 1 and 2 (the "SWMP")

7. Amended and Restated Solid Waste Disposal Service Agreement between the Town of Huntington and C-E Limited Partnership (the "Service Agreement")

8. Exhibits attached to Plaintiff's Memorandum of Law

9. Exhibits attached to the Affidavit of John Trent on behalf of Defendant